Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases

FEDERAL COURT (PUTRAJAYA) — CASE NOS 05(HC)-153–11 OF 2020(W), 05(HC)-155–11 OF 2020(W) AND 05(HC)-156–11 OF 2020(W)

TENGKU MAIMUN CHIEF JUSTICE, VERNON ONG, ZALEHA YUSOF, HASNAH HASHIM AND RHODZARIAH BUJANG FCJJ

27 APRIL 2021

Constitutional Law — Legislation — Validity of impugned legislation — Prevention of Crime Act 1959 ('the POCA') — Whether s 4 of the POCA was unconstitutional — Whether compulsion on magistrate under s 4(1) and (2) of the POCA to issue remand orders for fixed periods of time on application of police/public prosecutor took away magistrate's judicial power and discretion to decide whether or not remand should be granted and what period of remand was sufficient or reasonable in the circumstances — Whether requiring magistrate to 'rubber-stamp' dictates of Executive (via police and public prosecutor) breached doctrine of separation of powers and art 121(1) of the Federal Constitution prior to the article's 1988 amendment — Whether remand orders were invalid because magistrate failed to ensure all legal, procedural and constitutional safeguards were complied with before the orders were issued — Full guidelines which all magistrates should follow when dealing with remand applications under s 4 of the POCA

Criminal Procedure — Habeas corpus — Detention under Prevention of Crime Act 1959 — Whether applications for writs of habeas corpus became academic when detention period under challenge expired and replaced by another — Whether legality of detention had to be determined as at the time the writ of habeas corpus was filed — Whether all detention periods affecting detainee had to be viewed as a single overarching transaction — Whether lapse of initial detention period under challenge or its replacement by another period could not be used as excuse to say applications for habeas corpus had become academic as that would permit abuse of process of court and negate safeguard of fundamental liberty in art 5(2) of the Federal Constitution ('the FC') — Whether all cases that came after and departed from Federal Court's decision in Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals [2002] 4 MLJ 449 on whether a challenge to a detention could become academic were no longer good law on that point — Whether use of the POCA to arrest and detain persons for suspected involvement in online gaming was unlawful as such activity was not 'organised violence against persons or property' which POCA was enacted to quell — Whether inclusion of 'unlawful gaming' in Item 5 of First Schedule to POCA was ultra vires

art 149(1)(a) of the FC under which revamped POCA was created

The instant appeals were against the High Court's refusal to grant writs of habeas corpus to the three appellants for their release from a 21 day remand ordered by a magistrate under s 4 of the Prevention of Crime Act 1959 ('the POCA') following their arrest by police for alleged involvement in online gaming activities. The appellants — a businessman and two police officers — were initially detained by the Malaysian Anti-Corruption Commission ('MACC') while it was investigating the involvement of several members of the police force in online gambling activities. Upon their release on MACC bail, the appellants were arrested by police under s 3(1) of the POCA on the ground that they were involved in the organisation and promotion of unlawful gaming. The appellants were then produced before a magistrate ('the second respondent') who ordered their 21 day remand under s 4(1) of the POCA. The appellants applied for the writs of habeas corpus before the 21 days expired but before their applications could be heard, the police obtained from the magistrate a second order under s 4(2) of the POCA to remand the appellants for a further period of 38 days. When the habeas corpus applications came up for hearing, the respondents raised the preliminary objection ('PO') that the applications had become academic since the initial 21 day period of remand under challenge had already expired and been superseded by the second remand order. The High Court judge upheld the PO but nevertheless considered the applications on their merits and eventually dismissed them on the ground the arrests and detentions of the appellants were not mala fide.

In the instant appeals against the decision, the appellants raised the following main issues: (a) s 4 of the POCA was unconstitutional because the magistrate had no choice but to issue the 21 day remand order under s 4(1) when a written and signed statement of a police officer not below the rank of Inspector was produced to the magistrate stating that there were grounds for believing that the name of the person produced before the magistrate should be entered on the Register. The appellants argued that such compulsion upon the magistrate by the Executive (the police and public prosecutor) violated the doctrine of separation of powers as well as art 121(1) of the Federal Constitution ('the FC') as it stood before the said article was amended in 1988; (b) the detentions of the appellants were mala fide because the appellants were material witnesses in the MACC enquiry and the arrests were designed to frustrate the MACC's investigations because the police officers who had arrested the appellants and recommended their detentions were themselves the subject of the MACC's investigations; and (c) the Minister concerned had misused his power under s 22 of the POCA by including 'unlawful gaming' in Item 5 of the First Schedule to POCA although it was not an activity of 'organised violence against persons or property' which was what POCA was intended to deal with and quell. The appellants said the inclusion of 'unlawful gaming' in the said Schedule was ultra vires art 149(1)(a) of the FC pursuant to which the revamped POCA was created in 2014 and which clause formed the recital in

A the preamble of the POCA. And since the appellants' arrests and detentions were based on grounds that were alien to the object and purpose of the POCA, they were unlawful.

At the hearing of the instant appeals, the respondents again raised the PO that the appeals and the habeas corpus applications were academic. The B respondents relied upon the Federal Court's decisions in *Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri Malaysia & Ors* [2006] 1 MLJ 309 ('Faizal bin Haris') and *L Rajanderan a/l R Letchumanan v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2018] Supp MLJ 393 ('Rajanderan') to submit that a writ of habeas corpus must be directed only against a current detention order C even if the earlier arrest and detention of the detainee was irregular. The appellants, on the other hand, argued that the detentions should be looked at as a single cumulative transaction and not on a piecemeal basis and relied upon the Federal Court's five-member decision in *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & Other Appeals* [2002] 4 MLJ 449 ('Ezam') where the D appeals by the detainees there were not considered academic simply because they had been released from custody by the time the appeals were heard. The court there held that detentions must be looked at as a whole and if the court below had found the detention to be lawful, then the issue continued to be a live one on appeal. The appellants argued that since *Faizal bin Haris* and E *Rajanderan* were decided by three-member benches, the smaller benches should not have declined to follow the decision of the larger bench in *Ezam*.

Held, by majority, allowing the appeals only in terms of prayer 7 of the appellants' notice of motion (in respect of the remand orders issued under s 4 F of the POCA) and holding that s 4 of the POCA was valid and constitutional:

The majority verdict dismissing the PO and holding that the instant appeals were not academic:

(1) **(per Tengku Maimun Chief Justice, majority)** Given the weight of G authorities, *Ezam* was the correct decision and the one that ought to be followed. *Faizal bin Haris*, *Rajanderan* and other cases such as *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2003] MLJU 841, *Muhammad Jailani bin Kasim v Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2006] 6 MLJ 403 and other related decisions that came H after and departed from *Ezam* were no longer good law and could not be relied upon for the academic point raised by the respondents. The ratio in *Ezam*'s case was that detentions must be looked at as a whole. If the detention was found to be lawful, then the matter was not academic. Applying *Ezam* to these appeals, since the High Court found the I appellants' detentions to be lawful, the present appeals were not academic (see paras 28 & 56).

(2) **(per Tengku Maimun Chief Justice, majority)** *Ezam*, when read properly and in context, posited the ratio that the legality of a detention must be viewed as a single overarching transaction. The legality of the

detention must be addressed at the time the application for habeas corpus was made. The subsequent release (or, by extrapolation, the extended detention) in the light of a finding of lawfulness or unlawfulness of the initial detention rendered the entire issue of detention a live matter. *Faizal bin Haris* rejected this view on the basis of English and common law authorities and by referring to local judgments which referred to such authorities. *Faizal bin Haris* made no reference to art 5(2) of the Federal Constitution, which was the constitutional authority upon which the court derived its power of review over preventive detention. The court in *Ezam*, however, was apprised of art 5(2) (see paras 40–41 & 45).

(3) **(per Tengku Maimun Chief Justice, majority)** Unlike in the United Kingdom where there was no constitutionally-guaranteed protection for fundamental rights or a constitutionally-ordained enforcement mechanism, in Malaysia, such protections existed in art 4(1) of the Federal Constitution read together with Part II (Fundamental Liberties) and supplemented by para 1 of the Schedule to the Courts of Judicature Act 1964. Accordingly, the smaller benches in *Faizal bin Haris* and the later cases ought not to have confined and restricted themselves to the jurisprudence of English law in this otherwise wide area of our constitutional law (see paras 43–44).

(4) **(per Tengku Maimun Chief Justice, majority)** Decisions of high authority in the Malaysian, Irish and Indian jurisdictions which were decided before *Faisal bin Haris* coherently flowed with the line of reasoning adopted by the Federal Court in *Ezam* and established the proposition that when a person was detained, the legality of his detention was to be adjudicated by reference to the date the application for a writ of habeas corpus was filed. The detaining authorities could not 'shift the goal post' by alleging that further or subsequent detentions had been made which rendered the impugned detention academic. In other words, they could not rely on subsequent detentions to circumvent the illegality of the initial remand or detention under challenge at the time the writ of habeas corpus was filed. Otherwise, it would condone an abuse of process of the court, unduly narrow the interpretation of art 5(2) against settled constitutional canons of interpretation and render the safeguard of fundamental liberty in art 5(2) illusory (see paras 46–54).

The majority verdict that s 4 of the POCA was valid and constitutional:

(5) **(per Hasnah Hashim FCJ, majority)** Whether the appeals herein were academic or not, in the interests of justice the appellants should be allowed to argue on the propriety of the remand orders that were issued against them and the appeals must be heard on their merits (see para 241).

(6) **(per Hasnah Hashim FCJ, majority)** Under s 4 of the POCA, the magistrate was bound to exercise his/her discretion judicially in order to

ensure that all legal, procedural and constitutional safeguards had been strictly complied with before issuing the remand orders. In the instant appeals, there was no evidence that the magistrate had exercised the discretion as required; hence, the remand orders issued by the magistrate were tainted. For that reason, and that reason alone, the appeals were allowed only in terms of prayer 7 of the habeas corpus applications in respect of the remand orders issued under s 4 of the POCA (see para 330).

(7) **(per Hasnah Hashim FCJ, majority)** Any challenge to the constitutionality of s 4 of the POCA must be based on the existing provision of art 121 of the Federal Constitution and not on art 121 as it stood before it was amended. To interpret a law based on a provision that no longer reflected the position of the law and was no longer in existence by virtue of an amendment was misconceived and defied both legal logic and the canons of construction and interpretation. To do so would create a fallacious precedent that would inevitably lead to unprecedented consequences. By seeking a declaration that s 4 of the POCA was invalid for being inconsistent with the pre-amended art 121(1), the appellants were in essence collaterally attacking the validity of the amendment to art 121 in 1988. Such collateral attack could not be sustained. A specific declaratory application must be made under art 4 of the Federal Constitution which the appellants failed to do. Despite the amendment to art 121, judicial powers continued to vest in the courts as was evident from the language of art 121(1). The absence of the words 'judicial powers' in the text of art 121 did not in any way emasculate the powers of the courts. On the contrary, the jurisdiction and powers of the courts, as conferred by federal law, remained intact with the Judiciary. The jurisdiction and powers of the courts under POCA did not violate the amended art 121 of the Constitution (see paras 291, 306, 309 & 311).

(8) **(per Hasnah Hashim FCJ, majority)** There was no merit in the appellants' contention that the inclusion of unlawful gaming in Item 5 of the First Schedule to POCA was unconstitutional. Item 5 had been in existence in the First Schedule since POCA's promulgation in 1959 as the Legislature had recognised even then that such activities by secret societies, triads, and gangsters operating gambling dens had resulted in an upsurge of undesirable criminal activity that caused many people in business, hawkers as well as workers to live in fear. With the advent of technology, the organisation and promotion of unlawful gaming became more sophisticated. Unlawful gaming evolved to become such a sophisticated illicit activity that even in the present day it constituted a threat to public order and safety. The words 'organised violence against persons or property' in the recital of the POCA must not be interpreted restrictively but be assessed in the context and entire scheme of the POCA. Online gaming was a matter that fell within the description of

the crime of 'organised violence' (see paras 315–316, 318–319, 322 & 329). A

(9) **(per Hasnah Hashim FCJ, majority)** The contention that POCA was invalid and unconstitutional because Parliament had failed to incorporate the entire cl (1) of art 149 of the Federal Constitution into POCA's recital was not tenable. The preamble of the POCA recited the purpose of the Act which was to prevent any incursion or threat by a substantial body of persons within and outside Malaysia causing a substantial number of citizens to fear organised violence against persons or property. There was therefore no flaw in the preamble as suggested by the appellants (see paras 323–325). B C

(10) **(per Hasnah Hashim FCJ, majority)** The appellants failed to show that their arrests and detentions were mala fide as it was only their allegation that the police had detained them to 'shut them up' from revealing information to the MACC. On the factual matrix of these appeals, this argument was clearly flawed and unsustainable because the appellants were detained first by the MACC before they were detained under POCA. There was also affidavit evidence to show that the appellants were not witnesses, as they claimed, but suspects in the MACC's investigations (see paras 326–327). D E

(11) **(per Vernon Ong FCJ, concurring)** The making of a remand order under s 4(1) of the POCA was not a mechanical exercise and the magistrate was required to exercise his/her judicial mind to ensure that there was strict compliance with all legal, procedural and constitutional safeguards before making such an order. Therefore, the appellants' argument that s 4 of the POCA was unconstitutional because it required the magistrate to act on the dictates of the Executive thereby violating the doctrine of separation of powers was without merit (see paras 185 & 204). F G

(12) **(per Vernon Ong FCJ, concurring)** For a full exposition of the guidelines that magistrates should follow when faced with an application for remand under s 4 of the POCA (see paras 171–177 & 179–184).

(13) **(per Zaleha Yusof FCJ , concurring)** The power to issue remand under s 4 of the POCA was still with the Court and no other body. Hence, s 4 of the POCA did not violate art 121 of the Federal Constitution and was therefore valid and constitutional. Article 121 had to be read as it existed now, after it was amended, and not as it stood before it was amended on 10 June 1988 as suggested by the appellants. One could not read into the present law a provision that no longer existed. One could only read the provision as amended. As stated in s 35(1)(a) of the Interpretation Acts 1948 and 1967, a reference to a particular written law (which included the Federal Constitution) was, inter alia, 'a reference to that law as H I

amended or extended from time to time' (see paras 211–212).

The dissenting view that s 4 of the POCA was invalid and unconstitutional:

(14) **(per Tengku Maimun Chief Justice, dissenting)** Section 4 of the POCA was couched in imperative language. Both under s 4(1) and 4(2) of the POCA, on the production of the written and signed statements specified therein, the magistrate had no choice but to order the remand of a person for either 21 days or 38 days, as the case might be, without being able to apply his or her judicial mind or to exercise independent discretion to determine whether the remand application should be granted. The magistrate was also denied the discretion to decide the length and measure of the detention. The magistrate had to mechanically make the remand orders on the express dictate of the police and the public prosecutor. The respondents' argument that the magistrate, in issuing the remand order, was acting in an Executive capacity under POCA and not in a judicial capacity was flawed. In law, a magistrate making a remand order, even if it was under a preventive law, was exercising a judicial power and the source of that power was art 121(1) of the Federal Constitution. Binding judicial bodies to the opinions or whims of non-judicial bodies — more so, Executive bodies — was wholly inconsistent with the scheme of separation of powers established intrinsically by the Federal Constitution (see paras 111, 113–116, 121 & 124).

(15) **(per Tengku Maimun Chief Justice, dissenting)** Sections 4(1) and (2) of the POCA could not be regarded as valid 'federal law' within the meaning of art 121(1) read in the light of art 4(1) of the Federal Constitution. One of the intrinsic features of the Federal Constitution was that judicial power of the Federation was vested in the Superior Courts with constitutional sanction afforded to the subordinate courts to exercise some degree of judicial power. By binding the magistrate to the dictates of the Executive in the form of the police and the public prosecutor, ss 4(1) and (2) sought to override this particular constitutional feature. As such, ss 4(1) and (2) of the POCA were inconsistent with the FC and were void. The presumption of constitutionality had been overcome rendering the said provisions liable to be struck down. And since the rest of s 4 of the POCA was so inextricably tied to sub-ss (1) and (2) that they could not exist without the offending parts of s 4, the whole of s 4 of the POCA stood unconstitutional and void (see paras 126 & 128).

(16) **(per Tengku Maimun Chief Justice, dissenting)** The recital in POCA's preamble only contained what was stated in art 149(1)(a) of the Federal Constitution. By no stretch of the imagination could gaming offences be contemplated by art 149(1)(a) as something which might cause 'a substantial number of citizens to fear organised violence against persons

or property'. The respondents also did not make any mention of 'organised violence' in their affidavit. Consequently, Item 5 of the First Schedule to POCA, to the extent that it included gaming offences such as those under the Common Gaming Houses Act 1953 ('CGHA'), was ultra vires art 149(1)(a). Item 5 was inserted in the Schedule by the Minister under s 22 of the POCA in 2014. As this insertion was ultra vires art 149(1)(a), it was legally invalid. The appellants' arrests and detentions on the allegation that they had committed gaming offences under the CGHA was inconsistent with the recital in POCA which was drawn from art 149(1)(a) thereby rendering the grounds for their detention invalid and their resulting detention unlawful (see paras 137–139, 149–150 & 154).

(17) **(per Rhodzariah Bujang FCJ, concurring)** In regular remand applications, the magistrate retained the substantive discretion to consider, after reviewing all the relevant documents produced, whether to order remand, and if ordered, to determine the length of the remand. However, in the present case, once the magistrate was satisfied that the procedural requirements leading up to the application for remand were complied with, the magistrate was bound to order remand for a fixed period of 21 days (on first application) or 38 days (on second application) irrespective of his/her own objective assessment of whether such an application ought or ought not to be allowed, granted that the procedural requirements had been satisfied. This was a legislative restriction of a judicial body to abide by the dictates of an Executive body which this court had held to be a violation of judicial power and the doctrine of separation of powers. Section 4 of the POCA was therefore void and should be struck down for contravening art 121(1) of the Federal Constitution read together with the doctrine of constitutional supremacy espoused in art 4(1) (see paras 338–339).

(18) **(per Rhodzariah Bujang FCJ, concurring)** Whilst gambling syndicates would fall within the purview of 'organised crime' they could not be reasonably construed as meaning 'organised violence against property or persons' which was the only recital that Parliament had stipulated in the preamble of the POCA (see para 341).

(19) **(per Rhodzariah Bujang FCJ, concurring)** Although Item 5 of the First Schedule to POCA had existed even before the words in art 149(1)(a) were enacted into the preamble recital of the POCA, the continued existence of Item 5 was incongruous with the narrowly-construed purpose of art 149(1)(a) which was to prevent organised violence against property or persons. The legal and factual bases for the arrest and detention of the appellants for the common reason proferred, namely gambling syndicates, was therefore inconsistent with art 149(1)(a) (see para 342).

[Bahasa Malaysia summary

Rayuan-rayuan ini adalah terhadap penolakan Mahkamah Tinggi untuk memberikan writ-writ habeas corpus kepada ketiga-tiga perayu untuk pembebasan mereka dari tahanan reman 21 hari yang diperintahkan oleh majistret di bawah s 4 Akta Pencegahan Jenayah 1959 ('APJ') setelah mereka ditangkap oleh polis kerana disyaki terlibat dalam aktiviti perjudian dalam talian. Perayu — seorang ahli perniagaan dan dua pegawai polis — pada mulanya ditahan oleh Suruhanjaya Pencegahan Rasuah Malaysia ('SPRM') ketika sedang menyiasat penglibatan beberapa anggota pasukan polis dalam aktiviti perjudian dalam talian. Setelah dibebaskan dengan jaminan SPRM, perayu-perayu ditangkap oleh polis di bawah s 3(1) APJ dengan alasan bahawa mereka terlibat dalam penganjuran dan promosi perjudian haram. Perayu-perayu kemudian dikemukakan ke hadapan majistret (responden kedua) yang memerintahkan mereka ditahan selama 21 hari di bawah s 4(1) APJ. Perayu-perayu telah memohon writ-writ habeas corpus tersebut sebelum 21 hari tamat tetapi sebelum permohonan mereka dapat didengar, polis telah mendapatkan perintah kedua dari majistret di bawah s 4(2) APJ untuk mereman perayu-perayu untuk tempoh masa 38 hari lagi. Ketika permohonan habeas corpus dikemukakan untuk didengar, responden-responden telah menimbulkan bantahan awal ('BA') bahawa permohonan tersebut telah menjadi akademik oleh sebab tempoh reman 21 hari terdahulu telahpun luput dan diganti dengan perintah reman kedua. Hakim Mahkamah Tinggi mengekalkan BA itu tetapi bagaimanapun mempertimbangkan permohonan tersebut berdasarkan meritnya dan akhirnya menolaknya dengan alasan bahawa penangkapan dan penahanan perayu-perayu adalah tidak bersifat mala fide.

Dalam rayuan-rayuan ini terhadap keputusan tersebut, perayu-perayu telah mengemukakan isu-isu utama berikut: (a) s 4 APJ adalah tidak berperlembagaan kerana hakim tidak mempunyai pilihan selain mengeluarkan perintah reman 21 hari di bawah s 4(1) apabila penyataan yang ditulis dan ditandatangani pegawai polis yang tidak berpangkat di bawah Inspektor telah dikemukakan kepada majistret yang menyatakan bahawa terdapat alasan untuk mempercayai bahawa nama orang yang dikemukakan di hadapan hakim hendaklah dimasukkan dalam Daftarai. Perayu-perayu berpendapat bahawa paksaan terhadap hakim oleh Eksekutif (polis dan pendakwa raya) melanggar doktrin pemisahan kuasa dan juga perkara 121(1) Perlembagaan Persekutuan ('PP') kerana ia telah digubal sebelum perkara tersebut telah dipinda pada tahun 1988; (b) penahanan perayu-perayu bersifat mala fide kerana perayu-perayu adalah saksi material dalam siasatan SPRM dan penangkapan tersebut dirancang untuk menggagalkan siasatan SPRM kerana pegawai polis yang telah menangkap perayu-perayu dan mengesyorkan penahanan mereka adalah mereka sendiri tertakluk kepada siasatan SPRM; and (c) Menteri berkenaan telah menyalahgunakan kuasanya di bawah s 22 APJ dengan memasukkan 'perjudian yang menyalahi undang-undang' dalam butir 5 Jadual

Pertama kepada APJ walaupun itu bukan aktiviti 'keganasan terancang terhadap orang atau harta benda' yang dimaksudkan APJ untuk ditangani dan dihentikan. Perayu-perayu mengatakan penyertaan 'perjudian yang menyalahi undang-undang' dalam Jadual tersebut adalah ultra vires perkara 149(1)(a) PP menurut pindaan APJ yang telah dibuat pada tahun 2014 dan yang mana klausa itu membentuk resital dalam mukadimah APJ. Dan oleh kerana penangkapan dan penahanan perayu-perayu dibuat berdasarkan alasan yang tidak berkaitan dengan objektif dan tujuan APJ, ianya tidak sah.

Semasa rayuan-rayuan ini didengar, responden-responden sekali lagi telah menimbulkan BA bahawa rayuan-rayuan dan permohonan habeas corpus tersebut adalah bersifat akademik. Responden-responden bergantung pada keputusan Mahkamah Persekutuan dalam kes *Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri Malaysia & Ors* [2006] 1 MLJ 309 ('Faizal bin Haris') dan *L Rajanderan a/l R Letchumanan v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2018] Supp MLJ 393 ('Rajanderan') untuk mengemukakan bahawa writ habeas corpus perlu ditujukan hanya terhadap perintah penahanan semasa walaupun penangkapan dan penahanan orang tahanan itu sebelumnya adalah tidak teratur. Sebaliknya, perayu-perayu berpendapat bahawa penahanan itu harus dilihat sebagai satu transaksi kumulatif dan bukan berdasarkan sedikit demi sedikit dan bergantung pada keputusan lima anggota Mahkamah Persekutuan dalam kes *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & Other Appeals* [2002] 4 MLJ 449 ('Ezam') di mana rayuan-rayuan oleh orang tahanan berkenaan tidak dianggap akademik hanya kerana mereka telah dibebaskan dari tahanan pada saat rayuan itu didengar. Mahkamah dalam kes itu telah memutuskan bahawa penahanan tersebut perlu dilihat secara keseluruhan dan jika mahkamah bawahan mendapati penahanan itu sah, maka isu tersebut terus menjadi isu semasa rayuan. Perayu-perayu berpendapat bahawa oleh kerana kes-kes *Faizal bin Haris* dan *Rajanderan* diputuskan oleh panel tiga hakim, panel yang lebih kecil sepatutnya tidak menolak untuk mengikuti keputusan panel yang lebih besar seperti dalam kes *Ezam*.

Diputuskan, secara sebulat suara, membenarkan rayuan-rayuan hanya untuk permohonan 7 berhubung notis usul perayu-perayu (berkaitan perintah-perintah reman yang dikeluarkan di bawah s 4 APJ) dan memutuskan bahawa s 4 APJ adalah sah dan berperlembagaan:

Keputusan majoriti menolak BA itu dan memutuskan bahawa rayuan-rayuan ini tidak akademik:

(1) **(oleh Tengku Maimun Ketua Hakim Negara, majoriti)** Berdasarkan beban autoriti-autoriti tersebut, *Ezam* adalah keputusan yang betul dan yang patut diikuti. Kes-kes *Faizal bin Haris*, *Rajanderan* dan kes-kes lain seperti kes-kes *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2003] MLJU 841, *Muhammad Jailani bin Kasim v Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2006] 6 MLJ 403 dan

keputusan berkaitan lain yang dibuat selepas itu dan berbeza daripada kes *Ezam* bukan lagi undang-undang yang baik dan tidak boleh bergantung kepada untuk usul akademik yang ditimbulkan oleh responden-responden. Ratio kes *Ezam* adalah bahawa penahanan tersebut perlua dilihat secara keseluruhan. Jika penahanan itu didapati sah, maka perkara tersebut tidak menjadi akademik. Dengan mengguna pakai kes *Ezam* kepada rayuan-rayuan itu, oleh keran Mahkamah Tinggi mendapati penahanan perayu-perayu adalah sah, maka rayuan-rayuan ini tidak akademik (lihat perenggan 28 & 56).

(2) **(oleh Tengku Maimun Ketua Hakim Negara, majoriti)** Kes *Ezam*, apabila dibaca dengan betul dan dalam konteks, menunjukkan ratio yang kesahan penahanan perlu dilihat sebagai satu transaksi tunggal. Kesahan penahanan itu perlu dinyatakan pada masa permohonan untuk habeas corpus dibuat. Pelepasan berikutnya (atau, melalui ekstrapolasi, penahanan yang dilanjutkan) berdasarkan dapatan kesahan atau ketaksahan penahanan awal itu menjadikan keseluruhan isu penahanan suaut perkara yang secara langsung. Kes *Faizal bin Haris* menolak pandangan ini berdasarkan autoriti undang-undang Inggeris dan am dan engna merujuk kepada penghakiman tempatan yang merujuk kepada autoriti tersebut. Kes *Faizal bin Haris* tidak merujuk kepada perkara 5(2) Perlembagaan Persekutuan, yang merupakan autoriti berperlembagaan yang mana mahkamah mendapat kuasanya untuk membuat semakan ke atas penahanan pencegahan. Mahkamah dalam kes *Ezam*, bagaimanapun, telah dimaklumkan mengenai perkara 5(2) (lihat perenggan 40–41 & 45).

(3) **(oleh Tengku Maimun Ketua Hakim Negara, majoriti)** Tidak seperti di United Kingdom di mana tiada perlindungan yang dijamin perlembagaan untuk hak asasi atau mekanisme penguatkuasaan berperlembagaan, di Malaysia, perlindungan sedemikian wujud dalam perkara 4(1) Perlembagaan Persekutuan dibaca bersama dengan Bahagian II (Kebebasan Asasi) dan ditambah dengan perenggan 1 Jadual kepada Akta Mahkamah Kehakiman 1964. Oleh demikian, panel hakim yang lebih kecil dalam kes *Faizal bin Haris* dan kes-kes berikutnya tidak sepatutnya terbatas dan terhad dengan jurisprudens undang-undang Inggeris dalam bidang undang-undang perlembagaan yang sebenarnya amat luas (lihat perenggan 43–44).

(4) **(oleh Tengku Maimun Ketua Hakim Negara, majoriti)** Keputusan autoriti tertinggi dalam bidang kuasa Malaysia, Ireland dan India yang diptuskan sebelum kes *Faizal bin Haris* adalah selari dengan alasan yang diguna pakai oleh Mahkamah Persekutuan dalam kes *Ezam* dan membuktikan saranan bahawa apabila seseorang ditahan, kesahihan penahanannya hendaklah diadili dengan merujuk kepada tarikh permohonan untuk writ harbeas corpus difailkan. Pihak berkuasa yang

membuat penahanan tidak boleh 'shift the goal pot' dengan mengatakan bahawa penahanan selanjut atau berikutnya telah dibuat yang menajdikan penahanan yang dipersoalkan itu akademik. Dalam erti kata lain, ia tidak boleh bergantung kepada penahanan selanjutnya untuk memintas ketaksahihan reman atau penahanan awal yang dicabar pada masa writ habeas corpus difailkan. Jika sedemikian, ia akan membenarkan penyalahgunaan proses mahkamah, memberi tafsiran tidak meluas untuk perkara 5(2) berbanding pentafsiran perlembagaan lain yang tetap dan menjadikan perlindungan untuk kebebasan asasi dalam perkara 5(2) suatu khayalan (lihat perenggan 46–54).

Keputusan majoriti bahawa s 4 APJ adalah sah dan berperlembagaan:

(5) **(oleh Hasnah Hashim HMP, majoriti)** Sama ada rayuan-rayuan ini akademik atau tidak, demi kepentingan keadilan perayu-perayu patut dibenarkan berhujah tentang kewajaran perintah-perintah reman yang telah dikeluarkan terhadap mereka dan rayuan-rayuan itu patut didengar atas meritnya (lihat perenggan 241).

(6) **(oleh Hasnah Hashim HMP, majoriti)** Di bawah s 4 APJ, majistret terikat untuk melaksanakan budi bicaranya secara adil bagi tujuan memastikan bahawa semua perlindungan sah, mengikut prosedur dan berperlembagaan telah dipatuhi sewajarnya sebelum mengeluarkan perintah-perintah reman. Dalam rayuan-rayuan ini, tiada keterangan bahawa majistret telah melaksanakan budi bicaranya sepertimana dikehendaki; justeru, perintah-perintah reman yang dikeluarkan oleh majistret adalah dicemari. Oleh sebab itu, dan sebab itu sahaja, rayuan-rayuan tersebut dibenarkan hanya mengikut terma permohonan 7 dalam permohonan habeas corpus berkaitan perintah-perintah reman yang dikeluarkan di bawah s 4 APJ (lihat perenggan 330).

(7) **(oleh Hasnah Hashim HMP, majoriti)** Apa-apa cabaran terhadap perlembagaan s 4 APJ mestilah berdasarkan peruntukan sedia ada perkara 121 Perlembagaan Persekutuan dan bukan perkara 121 seperti yang dinyatakan sebelum ia dipinda. Untuk menafsirkan undang-undang berdasarkan peruntukan yang tidak lagi mencerminkan kedudukan undang-undang dan tidak lagi wujud berdasarkan suatu pindaan adalah suatu yang disalah anggap dan menentang dari segi logik perundangan dan kanun pembinaan dan penafsiran. Untuk berbuat sedemikian akan mewujudkan duluan (*precedent*) yang tidak betul yang pasti akan membawa kepada akibat yang belum pernah terjadi sebelumnya. Dengan memohon deklarasi bahawa s 4 APJ adalah tidak sah kerana tidak konsisten dengan perkara 121(1) yang telah dipinda sebelumnya, perayu-perayu pada dasarnya menyerang secara kolektif kesahihan pindaan pada perkara 121 pada tahun 1988. Serangan kolateral tersebut tidak dapat dipertahankan. Permohonan deklarasi spesifik perlu dibuat berdasarkan perkara 4 Perlembagaan Persekutuan

yang gagal dilakukan oleh perayu-perayu. Walaupun terdapat pindaan kepada perkara 121, kuasa kehakiman terus diberikan kepada mahkamah sebagaimana yang jelas dalam perkara 121(1). Ketiadaan kata-kata 'kuasa kehakiman' dalam teks perkara 121 sama sekali tidak melemahkan kuasa mahkamah. Sebaliknya, bidang kuasa dan kuasa mahkamah, seperti yang diberikan oleh undang-undang persekutuan, tetap utuh dengan Badan Kehakiman. Bidang kuasa dan kuasa mahkamah di bawah APJ tidak melanggar perkara 121 Perlembagaan Persekutuan (lihat perenggan 291, 306, 309 & 311).

(8) **(oleh Hasnah Hashim HMP, majoriti)** Tiada merit dalam hujah perayu-perayu bahaw kemasukan permaian yang menyalahi undang-undang dalam butiran 5 Jadual Pertama kepada APJ adalah tidak berperlembagaan. Butiran 5 telahpun wujud dalam Jadual Pertama sejak pengisytiharan APJ pada 1959 kerana Badan Perundangan telah mengiktiraf pada ketika itu lagi kegiatan sedemikian oleh pertubuhan rahsia, kongsi gelap dan samseng menjalankan operasi sarang perjudian telah mengakibatkan peningkatan aktiviti jenayah yang tidak diingini yang menyebabkan ramai orang dalam perniagaan, penjaja serta pekerja hidup dalam ketakutan. Dengan munculnya teknologi, penganjuran dan promosi perjudian haram ini menjadi lebih canggih. Perjudian yang menyalahi undang-undang ini berkembang menjadi aktiviti haram yang begitu canggih sehingga bahkan pada masa kini ia menjadi ancaman kepada ketenteraman dan keselamatan awam. Istilah 'keganasan terancang terhadap orang atau harta benda' dalam recital APJ tidak boleh ditafsirkan secara terhad tetapi dinilai dalam konteks dan keseluruhan skima APJ. Perjudian dalam talian adalah perkara yang termasuk dalam keterangan mengenai 'keganasan terancang' (lihat perenggan 315–316, 318–319, 322 & 329).

(9) **(oleh Hasnah Hashim HMP, majoriti)** Hujah bahawa APJ adalah tidak sah dan tidak berperlembagaan kerana Parlimen gagal untuk memasukkan keseluruhan klausa (1) perkara 149 Perlembagaan Persekutuan ke dalam peruntukan APJ tidak boleh dipertahankan. Mukadimah APJ memperuntukkan tujuan Akta itu yang mana adalah untuk mengelakkan apa-apa serangan atau ancaman oleh sekumpulan besar orang di dalam dan di luar Malaysia yang menyebabkan sebilangan besar warganegara takut keganasan terancang terhadap orang atau harta benda. Oleh itu, tidak ada kekurangan dalam mukadimah seperti yang disarankan oleh perayu-perayu (lihat perenggan 323–325).

(10) **(oleh Hasnah Hashim HMP, majoriti)** Perayu-perayu gagal untuk menunjukkan bahawa penangkapan dan penahanan mereka bersifat mala fide kerana ia hanya pengataan mereka bahawa polis telah menahan mereka untuk 'shut them up' daripada mendedahkan maklumat kepada SPRM. Berdasarkan matriks faktual berhubung rayuan-rayuan tersebut,

hujah ini jelas cacat dan tidak boleh dikekalkan kerana perayu-perayu telah ditahan terlebih dahulu oleh SPRM sebelum mereka ditahan di bawah APJ. Juga terdapat keterangan afidavit untuk menunjukkan bahawa perayu-peryau bukan saksi-saksi, sepertimana dikatakan oleh mereka, tetapi orang yang disyaki dalam siasatan SPRM (lihat perenggan 326–327).

(11) **(oleh Vernon Ong HMP, bersetuju)** Pembuatan perintah reman di bawah s 4(1) APJ bukan amalan mekanikal dan majistret dikehendaki menggunakan minda kehakimannya bagi memastikan bahawa terdapat pematuhan yang ketat dengan semua perlindungan perundangan, prosedur dan perlembagaan sebelum membuat perintah tersebut. Oleh demikian, hujah perayu-perayu bahawa s 4 APJ adalah tidak berperlembagaan kerana ia menghendaki majistret bertindak atas perintah Badan Eksekutif yang melanggar doktrin pengasingan kuasa adalah tanpa merit (lihat perenggan 185 & 204).

(12) **(oleh Vernon Ong HMP, bersetuju)** Bagi ekposisi penuh untuk garis panduan yang patut diikuti oleh majistret apabila berhadapan dengan permohonan untuk reman di bawah s 4 APJ (lihat perenggan 171–177 & 179–184).

(13) **(oleh Zaleha Yusof HMP, bersetuju)** Kuasa untuk mengeluarkan reman di bawah s 4 APJ masih dengan mahkamah dan bukan badan lain. Justeru, s 4 APJ tidak melanggar perkara 121 Perlembagaan Persekutuan dan dengan itu sah dan berperlembagaan. Perkara 121 perlu dibaca seperti yang ada sekarang, selepas ia dipinda, dan bukan seperti yang dinyatakan sebelum ia dipinda pada 10 Jun 1988 sebagaimana dicadangkan oleh perayu-perayu. Seseorang itu tidak boleh membaca undang-undang sedia ada dengan peruntukan yang tidak lagi wujud. Ia hanya boleh dibaca dengn peruntukan yang telah dipinda. Sebagaimana dinyatakan dalam s 35(1)(a) Akta Tafsiran 1948 dan 1967, suatu rujukan kepada undang-undang bertulis tertentu (yang termasuk Perlembagaan Persekutuan) adalah, antara lain, 'a reference to that law as amended or extended from time to time' (lihat perenggan 211–212).

Pandangan yang menentang bahawa s 4 APJ adalah tidak sah dan tidak berperlembagaan:

(14) **(oleh Tengku Maimun Ketua Hakim Negara, menentang):** Seksyen 4 APJ disusun dalam bahasa yang bersifat penting. Kedua-duanya di bawah s 4(1) dan s 4(2) APJ, mengenai pengeluaran penyataan bertulis dan ditandatangani yang dinyatakan di dalamnya, hakim tidak mempunyai pilihan selain memerintahkan reman ke atas seseorang selama 21 hari atau 38 hari, mengikut mana yang berkenaan, tanpa dapat menerapkan pemikiran kehakimannya atau menggunakan budi bicara bebas untuk menentukan sama ada permohonan reman patut diberikan. Majistret juga dinafikan budi bicara untuk menentukan panjang dan

ukuran penahanan itu. Majistret perlu secara mekanikal membuat perintah reman itu atas perintah polis dan pendakwa raya. Hujah responden bahawa majistret, dalam mengeluarkan perintah reman, bertindak dalam kapasiti Badan Eksekutif di bawah APJ dan bukan dalam kapasiti kehakiman adalah cacat. Dari segi undang-undang, majistret yang membuat perintah reman, walaupun di bawah undang-undang pencegahan, menjalankan kuasa kehakiman dan sumber kuasa itu adalah perkara 121(1) Perlembagaan Persekutuan. Mengikat badan kehakiman dengan pendapat atau kehendak badan bukan kehakiman — lebih-lebih lagi, badan eksekutif — sama sekali tidak konsisten dengan skima pengasingan kuasa yang ditubuhkan secara intrinsik oleh Perlembagaan Persekutuan (lihat perenggan 111, 113–116, 121 & 124).

(15) **(oleh Tengku Maimun Ketua Hakim Negara, menentang)** Seksyen 4(1) dan (2) APJ tidak boleh dianggap sebagai 'federal law' yang san dalam maksud perkara 121(1) dibaca berdasarkan perkara 4(1) Perlembagaan Persekutuan. Salah satu ciri intrinsik Perlembagaan Persekutuan adalah bahawa kuasa kehakiman Persekutuan termaktub dalam mahkamah atasan dengan sanksi perlembagaan yang diberikan kepada mahkamah bawahan untuk melaksanakan tahap kuasa kehakiman tertentu. Dengan mengikat majistret untuk memerintahkan Badan Eksekutif melalui polis dan pendakwa raya, ss 4(1) dan (2) bertujuan untuk mengatasi ciri perlembagaan tertentu ini. Oleh itu ss 4(10) dan (2) APJ tidak konsisten dengan PP dan adalah terbatal. Andaian perlembagaan telah diatasi menjadikan peruntukan tersebut patut dimansuhkan. Dan oleh kerana bahagian lain s 4 APJ begitu terikat dengan sub-s (1) dan (2) sehingga tidak dapat wujud tanpa bahagian yang menyinggung dari s 4, keseluruhan s 4 APJ adalah tidak berperlembagaan dan terbatal (lihat perenggan 126 & 128).

(16) **(oleh Tengku Maimun Ketua Hakim Negara, menentang)** Resital dalam mukadimah APJ hanya mengandungi apa yang dinyatakan dalam perkara 149(1)(a) Perlembagaan Persekutuan. Tidak boleh dibayangkan kesalahan perjudian tersebut dapat dipertimbangkan oleh perkara 149(1)(a) sebagai suatu yang mungkin menyebabkan 'a substantial number of citizens to fear organised violence against persons or property'. Responden-responden juga tidak menyebutkan tentang 'organised violence' dalam afidavit mereka. Berikutan itu, Butiran 5 Jadual Pertama kepada APJ, setakat mana ia termasuk kesalahan perjudian tersebut seperti yang di bawah Akta Rumah Judi Terbuka 1953 ('ARJT'), adalah ultra vires perkara 149(1)(a). Butiran 5 dimasukkan dalam Jadual oleh Menteri di bawah s 22 APJ pada 2014. Oleh kerana kemasukan ini adalah ultra vires perkara 149(1)(a), ia adalah tidak sah dari sedi undang-undang. Penangkapan dan penahanan perayu-perayu atas dakwaan bahawa mereka telah melakukan kesalahan perjudian di bawah

ARJT adalah tidak konsisten dengan resital APJ yang diambil daripada perkara 149(1)(a) sehingga menyebabkan alasan untuk penahanan mereka tidak sah dan penahanan mereka akibat itu tidak sah (lihat perenggan 137–139, 149–150 & 154).

(17) **(oleh Rhodzariah Bujang HMP, bersetuju)** Dalam permohonan reman biasa, majistret mengekalkan budi bicara substantif untuk mempertimbangkan, setelah meneliti semua dokumen yang relevan yang dikemukakan, sama ada untuk memerintahkan reman, dan jika diperintahkan, untuk menentukan tempoh reman tersebut. Namun, dalam kes ini, setelah majistret berpuas hati bahawa keperluan prosedur yang membawa kepada permohonan reman dipatuhi, majistret adalah terikat untuk memerintahkan reman untuk tempoh tetap 21 hari (pada permohonan pertama) atau 38 hari (pada permohonan kedua) tanpa mengira penilaian objektifnya sendiri sama ada permohonan tersebut patut atau tidak patut dibenarkan, dengan syarat bahawa keperluan prosedur telah dipenuhi. Ini adalah batasan perundangan badan kehakiman untuk mematuhi perintah badan Eksekutif yang dianggap oleh mahkamah ini sebagai pelanggaran kuasa kehakiman dan doktrin pengasingan kuasa. Oleh itu, s 4 APJ adalah tidak sah dan patut dibatalkan kerana melanggar perkara 121(1) Perlembagaan Persekutuan yang dibaca bersama dengan doktrin ketuanan perlembagaan yang disokong dalam perkara 4(1) (lihat perenggan 338–339).

(18) **(oleh Rhodzariah Bujang HMP, bersetuju)** Walaupun sindiket perjudian berada dalam lingkup 'organised crime', ia tidak wajar ditafsirkan sebagai bermaksud 'organised violence against property or persons' yang merupakan satu-satunya resital yang ditetapkan oleh Parlimen dalam mukadimah APJ (lihat perenggan 341).

(19) **(oleh Rhodzariah Bujang HMP, bersetuju)** Walaupun butiran 5 Jadual Pertama APJ telah wujud bahkan sebelum perkataa-perkataan dalam perkara 149(1)(a) dimasukkan ke dalam mukadimah resital APJ, kewujudan butiran 5 yang berterusan adalah tidak sesuai dengan maksud perkara 149(1)(a) yang ditafsirkan secara sempit yang bertujuan untuk mencegah keganasan terancang terhadap harta benda atau orang. Asas undang-undang dan fakta untuk penangkapan dan penahanan perayu-perayu atas alasan biasa, iaitu sindiket perjudian, adalah dengan itu tidak konsisten dengan perkara 149(1)(a) (lihat perenggan 342).]

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Sri Sankari Prasad Singh Deo v Union of India and State of Bihar 1951 AIR 458; 1952 SCR 89, SC (refd)
The State (at the Prosecution of Robert Trimbole otherwise known as Michael Hanbury) v The Governor of Mountjoy Prison [1985] IR 550 (refd)
State of Mauritius v Khoyratty [2006] 2 WLR 1330, PC (refd)
Stephen Kalong Ningkan v Tun Abang Haji Openg & Tawi Sli (No 2) [1967] 1 MLJ 46 (refd)
Teh Cheng Poh v PP [1979] 1 MLJ 50, PC (refd)
Theresa Lim Chin Chin & Ors v Inspector General of Police [1988] 1 MLJ 293, SC (refd)
Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors [2014] 4 MLJ 765, FC (refd)
Vimal Kishore Mehrotra v State of Uttar Pradesh And Anr AIR 1956 All 56, HC (refd)
Yeap Hock Seng @ Ah Seng v Minister for Home Affairs, Malaysia & Ors [1975] 2 MLJ 279 (refd)
Yong Tshu Khin & Anor v Dahan Cipta Sdn Bhd & Anor and other appeals [2021] 1 MLJ 478; [2021] 1 CLJ 631, FC (refd)

Legislation referred to

Constitution of India [IN] arts 13, 14, 19(1)(f), 25, 26, 31, 32, 226, 368, Part III
Constitution of Ireland 1937 [IRL] art 40(4)(2)
Constitution of Germany [DE] arts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 12a, 13, 14, 15, 16, 16a, 17, 17a, 18, 19, 20, 79, 79(3)
Constitution of Germany (1919–1933) [DE] art 76
Common Gaming Houses Act 1953 s 27A
Companies Act 1965
Courts of Judicature Act 1964 s 77, Schedule 1, para 1
Criminal Procedure Code ss 28A, 117, 117(2), 418A
Dangerous Drugs (Special Preventive Measures) Act 1985 s 6(1)
Dangerous Drugs Act 1952 s 39B
Emergency (Public Order and Prevention of Crime) Ordinance 1969
Federal Constitution arts 3(1), (2), 4, 4(1), 4(2), 4(3), 4(4), 5, 5(1), (2), (3), (4), (5), 8(1), 9, 9(2), 10, 10(2), 12(1), 13, 22, 74, 74(1), 121, 121(1), 128, 149, 149(1), 149(1)(a), (1)(b), (1)(c), (1)(d), (1)(e), (1)(f), 150, 151(1), 159, 159(1), 160, 162(6), Ninth Schedule, Lists I, II, IIIA, Parts II, XI, IX
Immigration Act 1959/63 s 59A
Internal Security Act 1960 (repealed by Security Offences (Special Measures) Act 2012) ss 8, 73
Interpretation Acts 1948 and 1967 ss 3, 35

Land Acquisition Act 1960 s 40D
Limitation Act 1953
Penal Code s 302
Prevention of Crime Act 1959 ss 3, 3(1), 3(2), 4, 4(1), (1)(a), (2), 15B, 19A(1), 22, First Schedule, Item 5, Part I
Restricted Residence Enactment 1933
Rules of Court 2012 O 53
Security Offences (Special Measures) Act 2012

Appeal from: Criminal Application Nos WA-44–207–10 of 2020, WA-44–206–10 of 2020 and WA-44–208–10 of 2020 (High Court, Kuala Lumpur)

Gopal Sri Ram (Gobind Singh Deo, Jacky Loi Yap Loong, Nur Aminathul Mardiah bt Md Nor and Sara Ann Chay with him) (TY Teh & Partners) for the appellants.
Muhammad bin Sinti (Zulkipli bin Abdullah, Nur Jihan bt Mohd Azman, Shahidah Nafisah bt Leman and Muhamad Safuan bin Azhar with him) (Attorney General's Chambers) for the respondents.

Tengku Maimun Chief Justice:

INTRODUCTION

[1] Article 5(1) of the Federal Constitution ('the FC') guarantees that no person shall be deprived of life or personal liberty save in accordance with law. While our constitutional jurisprudence has read into art 5(1) many other implied rights under the banner of a broad, generous and liberal interpretation, one must not forget that detention — especially preventive detention — is the most basic deprival of personal liberty.

[2] In this regard, art 5(2) is an expressly enumerated provision guaranteeing judicial supervision and protection over those who have been unjustifiably detained in contravention of the law. The mechanism for its enforcement (itself an inherent judicial power) is statutorily codified in para 1 of Schedule 1 of the Courts of Judicature Act 1964 ('the CJA 1964').

[3] These appeals, which involve three different appellants/detenus and four common respondents, call into question the application of these very elementary principles. These appeals also once again call into question judicial power but specifically as regards the constitutional validity of certain provisions of the Prevention of Crime Act 1959 ('the POCA 1959') (post amendment in 2014) and certain administrative acts effected pursuant to those and other provisions leading up to the eventual detention of the three appellants. Apart from the above, these appeals raise questions on the breadth and application of

A art 149 of the FC vis a vis s 4 of POCA 1959.

[4] I remind myself of the cardinal principles on habeas corpus that the burden to justify the legality of a detention rests on the detaining authority (see the pronouncements of this court in *Chua Kian Voon v Menteri Dalam Negeri Malaysia & Ors* [2020] 1 MLJ 351; [2020] 1 CLJ 747 ('Chua Kian Voon') at para 14 and *SK Tangakaliswaran a/l Krishnan v Menteri Dalam Negeri, Malaysia & Ors* [2010] 1 MLJ 149; [2009] 6 CLJ 705, at para 5).

[5] The above principle is in accord with the very language of art 5(2) of the FC having regard to the words 'unless satisfied that the detention is lawful'. The burden is constitutionally thrusted upon the detaining authority to establish to the court's satisfaction that any given detention is lawful.

BACKGROUND FACTS

[6] The facts of these appeals are as gathered from the judgment of the learned judicial commissioner ('JC') and from the submissions of parties. I respectfully adopt them subject to some modifications.

[7] The appellants/detenus were initially detained by the Malaysian Anti-Corruption Commission ('MACC') in a specific investigation on corruption within the police force. The appellants, who were later released on MACC bail were then subsequently arrested and taken into immediate custody by the police under s 3(1) of the POCA 1959. The appellants assert that they are material witnesses in that MACC investigation and that they were detained by the very police officers who were the subjects of that corruption investigation.

[8] The basis for the detention of the appellants under the POCA 1959 was purportedly pursuant to the Common Gaming Houses Act 1953 ('the CGHA 1953'). This must be read together with s 4 of the POCA 1959 which stipulates the procedure before a magistrate and s 22 of the POCA 1959 which confers power on the Minister to amend the Schedules to POCA 1959. Vide an amendment to the Schedules in 2014, item 5 was inserted in the First Schedule. Item 5 provides that all persons concerned in the organisation and promotion of unlawful gaming constitute a registrable category of persons for the purposes of the POCA 1959.

[9] On 14 October 2020, the appellants were produced before the second respondent, the magistrate, who ordered their remand for a period of 21 days under s 4(1) of the 1959 ('first remand'). The first remand was to expire on 3 November 2020 but on 21 October 2020 the appellants filed the present applications for habeas corpus.

[10] The return date for the habeas corpus applications was fixed on 2 November 2020. On 30 October 2020, the first and third respondents produced the appellants again before a magistrate for a fresh remand order. A new remand order for a period of 38 days was issued on the same date ('second remand').

[11] When the applications for writ of habeas corpus (premised on the first remand) came up for hearing on 2 November 2020, learned senior federal counsel ('SFC') for the respondents recorded an objection against the applications to wit, that the habeas corpus applications had become academic on account of the second remand.

[12] The learned JC agreed with the respondents. He held that the issue of the appellants' detention had become academic by virtue of the second remand. His Lordship nevertheless proceeded to examine the applications on their merits. He did not appear to address the arguments raised by the appellants on the constitutional issue but focussed his attention mostly on whether the detention was coloured by mala fides. He concluded that the appellants had not made out a case to entitle them to the remedy of habeas corpus. The applications were thus dismissed and, hence these appeals.

[13] I have read the majority judgment in draft of my learned sister Justice Hasnah Mohammed Hashim and it is with deep regret that I do not share her views for the reasons stated in this judgment.

THE APPEALS

[14] Before us, learned SFC submitted that there have been further developments in the case. He claimed to have information from the Advisory Board that the appellants have been further detained under s 19A(1) of the POCA 1959 for a period of two years beginning 25 November 2020. Learned counsel for the appellants took issue with this submission, contending it to be an averment from the Bar. With respect, we agree with the appellants. In any event, the gist of the complaint as well as the prayer for habeas corpus relates to the first remand and the detentions continuing therefrom. In the circumstances, whether the appellants were subsequently detained by virtue of the decision of the Advisory Board is not materially relevant to these appeals.

[15] In this judgment, I shall confine my analysis primarily to the first remand as adjudicated by the court below as it is the initial detention upon which all the subsequent detentions are predicated.

Parties' submissions

[16] Learned counsel for the appellants made the following five-fold arguments.

[17] Firstly, he argued that the entirety of s 4 of the POCA 1959 is unconstitutional. Secondly, that the preliminary objection by the respondents that the application is academic is invalid in light of art 5(2) of the FC. He contended that the detention must be viewed as a cumulative transaction and not piecemeal. Thirdly, that the detention is tainted by mala fides. Fourthly, the Minister's exercise of power under s 22 of the POCA 1959 to include the CGHA 1953 in Item 5 of the First Schedule to POCA 1959 is ultra vires art 149(1) of the FC. Fifthly, and as a result, the statement of facts delivered under s 4(1) of the POCA 1959 do not coincide with the recital in POCA 1959.

[18] Learned counsel Datuk Seri Gopal Sri Ram submitted that on all the above grounds, or any one of them, the appellants' detentions are unlawful and that accordingly, they ought to be granted, as of right, a writ of habeas corpus ordering their release.

[19] It is a trite principle of law that if the detaining authority fails to justify the lawfulness of a detention, habeas corpus must issue as of right unlike other prerogative writs such as certiorari which the court otherwise has discretion to refuse even if the breach is proved (see the judgment of this court in *Mohammad Azanul Haqimi bin Tuan Ahmad Azahari v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2019] 6 MLJ 220; [2019] 8 CLJ 465 affirming the dictum of Abdoolcader J in *Yeap Hock Seng @ Ah Seng v Minister for Home Affairs, Malaysia & Ors* [1975] 2 MLJ 279 at p 281).

[20] The respondents' submission, as I understand it, is as follows: that the present dispute is academic in light of the second remand; that s 4 of the POCA 1959 is constitutionally valid, that the insertion of the CGHA 1953 in Item 5 and the statement of facts delivered thereunder are within the general purview of art 149(1) of the FC, that the detention was not mala fide and that all the impugned detentions are in accordance with the law namely the FC and POCA 1959.

FINDINGS/ANALYSIS

[21] It would be more cogent for me to begin this judgment by first addressing the preliminary objection followed by a discussion on s 4 of the POCA 1959 and the interrelation between s 22 of the POCA 1959 as well as Item 5 of the First Schedule of the POCA 1959 and art 149(1) of the FC. The remaining arguments will be addressed wherever relevant.

Preliminary objection — Whether these appeals are academic

[22] Learned counsel for the appellants argued that in any given case, the fact of detention must be viewed as a whole and as a single cumulative transaction. Learned counsel placed heavy reliance on the judgment of this court in *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & Other Appeals* [2002] 4 MLJ 449; [2002] 4 CLJ 309 ('Ezam'). He urged us not to depart from the reasoning of this court in *Ezam*.

[23] In response, En Muhammad Sinti, learned SFC relied on decisions of this court subsequent to *Ezam*, among others, *Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri Malaysia & Ors* [2006] 1 MLJ 309; [2005] 4 CLJ 613 ('Faizal bin Haris') and *L Rajanderan a/l R Letchumanan v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2018] Supp MLJ 393; [2010] 7 CLJ 653 ('Rajanderan'). *Faizal bin Haris* and *Rajanderan* decided that a writ of habeas corpus must be directed only against the current detention order even if the earlier arrest and detention of the detenu is irregular. It was thus submitted by learned SFC that each detention order must be viewed in isolation. Once one order lapses, a new writ of habeas corpus must be applied in respect of the subsequent decision to detain.

[24] Counsel for the appellants had, in essence, two responses to the above argument. He submitted firstly, that the five-justices bench in *Ezam* was a larger bench and thus, the benches in *Faizal bin Haris* and *Rajanderan* (three-justices benches) ought not to have departed from *Ezam*.

[25] Secondly, and in terms of substance, the appellants' submission is that *Ezam* is the more legally coherent decision and one which should be preferred over the latter two judgments and other subsequent pronouncements made contrary to it. In support of his contention, learned counsel referred us to numerous authorities both local and foreign (specifically those from India and Ireland).

[26] At the outset, I wish to state that in my view, it is not abhorrent for us to refer to Indian and Irish judgments for this area of the law. Our constitutional provisions are crafted and related jurisprudence has developed in quite the same way due to our analogous constitutional provisions. I propose to deal with a few of these authorities later in this judgment.

[27] In *Ezam*, the detenus had been detained under s 73 of the now repealed Internal Security Act 1960 for planning street demonstrations. The High Court found that the detentions were valid. The detenus appealed. Parties opposing the appeal argued that as the detenus had since been released, the argument in respect of the legality of their detention had become academic.

Abdul Malek Ahmad FCJ writing the judgment on this aspect of the case rejected that argument. His Lordship had this to say on the preliminary objection raised, at pp 481–482:

> As for the first preliminary objection, he stressed that since the second appellant had been released, his appeal was no longer a living issue and was purely academic. As for the second preliminary objection, he reiterated that the other four appellants were no longer under police custody as the minister had ordered them to be detained under s 8(1) of the ISA with effect from 2 June 2001. This undisputed fact makes mockery, he said, of the fact that the applications for habeas corpus are directed not against the minister but against the Inspector-General of Police ('the IGP') as the respondent. Since they were no longer under police custody under s 73 of the ISA, he added, the appeal has been rendered academic. The appropriate course of action, he suggested, was to file a writ of habeas corpus against the minister.
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> ...
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> After a short recess, we unanimously held that the issue is still alive in view of the finding of the High Court that the detentions of the five appellants are lawful and decided that there was no merit to the preliminary objections. We accordingly ordered the appeals to proceed on the next hearing date.

[28] At the time the preliminary objection came to be decided, it was a bench of five comprising Dzaiddin Chief Justice, Wan Adnan PCA, Steve Shim CJ (Sabah and Sarawak), Abdul Malek Ahmad FCJ (as he then was) and Siti Norma Yaakob FCJ (as she then was). Wan Adnan PCA passed away after the decision on the preliminary objection. The ratio in *Ezam*'s case is that detentions must be looked at as a whole. If the detention is found to be lawful, then the matter is not academic. Applying the ratio in *Ezam* to these appeals, as the learned JC found that the appellants' detention was lawful, I conclude that the present appeals are not academic.

[29] In so concluding, I also find support in the judgment of the Privy Council in an appeal from the Court of Appeal of Belize. In *Fuller v Attorney General of Belize* (2011) 79 WIR 173, Lord Phillips observed thus at p 195:

> Because it is not, in reality, *the appellant's right to liberty that is at the heart of this appeal, Mr Lewis's submission that he has no cause to complain because he has been released on bail is off target*. There is no merit in that contention in any event. *It is well established that on an application for habeas corpus an applicant on bail is to be treated as if he were in custody*: see *R v Secretary of State for the Home Dept, ex p Launder (No 2)* [1998] QB 994 at 1000–1001. *The legality of bail depends upon the legality of the prior detention and it must be open to a person who has been bailed to challenge his being subjected to bail on the ground that this was a consequence of the violation of his right to liberty*. (Emphasis added.)

[30] As regards *Faizal bin Haris* and *Rajanderan*, it is sufficient for me to refer only to *Faizal bin Haris*. This is because *Rajanderan* did not refer to *Ezam* but

followed *Faizal bin Haris* in which case Augustine Paul FCJ made the following observations at p 319 (MLJ); p 629 (CLJ):

> However, the conclusion was reached not on the rationale as discussed in this judgment but on the principles enunciated in *Karam Singh v Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs), Malaysia* [1969] 2 MLJ 129. Such an approach would leave unanswered the effect of procedural irregularities in an earlier detention which has been superseded by another detention order. Be that as it may, that case made it clear that a court has no jurisdiction to hear a writ filed against the police for irregularities in a detention order under s 73(1) of the Internal Security Act 1960 when it had been superseded by one under s 8(1) thereby bringing into sharp focus the propriety of the judgment of this court in *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & Other Appeals* [2002] 4 MLJ 449; [2002] 4 CLJ 309. The rationale underlying this judgment would, with respect, render the stand taken in the latter case unsustainable in law.

[31] This court in *Faizal bin Haris* thus effectively overruled *Ezam*. Given the line of argument and the divergent views on the two lines of authorities, it is pertinent to re-examine the law on this subject.

[32] The first point is on the difference between larger and smaller benches. In this regard, this is what Peh Swee Chin FCJ observed in *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1 ('Dhalip'), at p 14:

> In this connection, the question of a 'full court' or a panel of Federal Court comprising more than three members as compared with the ordinarily constituted coram of three members of the same court, arises for consideration. In view of the reasons about departing from its previous decisions advanced above, the effect or weight of a decision of a 'full court' and that of an ordinary coram is the same by necessary implication. A full court or a panel larger than the ordinary coram is usually indicated such as when an unusually difficult or controversial question of law is involved, or a question arises as to whether a previous decision of the Federal Court ought to be overruled.

[33] The above passage, to my mind, establishes two principles. Firstly, strictly speaking within the context of our written law, there is no difference in law between a judgment delivered by a smaller bench or a larger bench. This may be inferred from s 77 of the CJA 1964 which provides that 'proceedings shall be decided in accordance with the opinion of the majority of the Judges comprising the Court'. In terms of written law therefore, the number of judges from case to case does not strictly matter. This is because the majority judgment of the court generally becomes law and binding precedent in all subsequent cases. It is not therefore a ground per se to overrule a subsequent decision of the smaller bench which had departed from the larger bench.

[34] Be that as it may, the second portion of the passage establishes that the number of judges from case to case is nonetheless relevant in terms of the principles of stare decisis — a principle followed assiduously by our courts for nearly a century though it is not expressly contained in our written law. Viewed from this angle, the above dictum of Peh Swee Chin FCJ suggests that the strength and size of a bench in a previous case is one relevant factor when determining whether or not that previous decision ought to be followed in a subsequent case.

[35] Minimally, the non-compliance of a smaller bench of the same court in a subsequent case to a decision of the court delivered by a larger bench in the previous case goes to judicial integrity and courtesy. *Dhalip* explained the circumstances in which the apex court ought to depart from its previous decisions which is an exercise not governed by the FC or statute. While it is true that there is no legal basis in written law to hold a smaller bench to the decision of a larger bench in a previous decision, it is a matter of stare decisis and judicial policy aimed at preserving public confidence in the Judiciary.

[36] The importance of adherence to the doctrine of stare decisis lies in the fact that it has become the cornerstone of the common law practiced in this country. It is fundamental that decisions of the courts, especially of the apex court, ought to be consistent, in the interests of finality and certainty in the law. Otherwise the public and lawyers who have regulated their affairs in reliance on a ratio decidendi before it is overruled will face difficulty and confusion in organising their affairs around such judgments and this in turn will affect public confidence in the Judiciary (see *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293; *Public Prosecutor v Datuk Tan Cheng Swee & Anor* [1980] 2 MLJ 276. See also *Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149). If a smaller bench in one case refuses to follow a decision of a larger bench in a previous case deciding the same point of law, the correctness of the decision of that smaller bench ought to be subjected to a higher scrutiny by a subsequent panel of the court — more so in constitutional cases and cases involving fundamental liberties.

[37] With these principles in mind, I now turn to scrutinise with respect, the judgment of this court in *Faizal bin Haris* in light of its expressed departure from *Ezam*.

[38] In *Faizal bin Haris*, the court found that the initial arrest and detention of the detenu was irregular and legally invalid. But after being arrested by the police under the Dangerous Drugs (Special Preventive Measures) Act 1985 which arrest was called into question and against which the writ of habeas corpus was sought, the detenu was subsequently detained by order of the Minister. The three judges of this court namely: PS Gill FCJ, Richard

Malanjum FCJ (as he then was) and Augustine Paul FCJ decided that in light of the subsequent detention by the Minister, the earlier detention by the police was no longer relevant.

[39] For the reasons that follow, I am more inclined to accept the reasoning of the unanimous five-judge panel in *Ezam*.

[40] *Ezam* when read properly and in context posits the ratio decidendi that the legality of a detention or detentions must be viewed as a single overarching transaction. This is because the legality of the detention must be addressed at the time the application for habeas corpus was made. The subsequent release (and by extrapolation the extended detention) in light of a finding of lawfulness or unlawfulness of the initial detention renders the entire issue of detention a live matter. *Faizal bin Haris* rejected this view on the basis of English and common law authorities and by referring to local judgments which referred to such authorities. For instance, at pp 318–319 (MLJ); p 628 (CLJ), Augustine Paul FCJ noted as follows:

> Thus any irregularity in a detention order made under s 3(2) when it has been superseded by one under s 6(1) is not a relevant matter for consideration. In this regard *The Law of Habeas Corpus* (2nd Ed) by RJ Sharpe says at p 179:
>
> > It has been held consistently that the relevant time at which the detention of the prisoner must be justified is the time at which the court considers the return to the writ. This rule means that nothing which has happened before the present cause of detention took effect will be relevant to the issue before the court, unless by reason of some special consideration arising from the particular proceedings.
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> And at p 186:
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> > On the present state of the law, in almost every instance, the relevant time at which the detention is to be justified is the time at which the court considers the case. Prior illegality will not be relevant unless by reason of some special rule derived from the particular nature of the proceedings involved.

[41] *Faizal bin Haris* made no reference to art 5(2) of the FC. In stark contrast, the court in *Ezam* was apprised of that constitutional provision as is apparent from the separate judgment of Siti Norma Yaakob FCJ (as she then was) at p 517 observing thus:

> Clearly, it is the legal status of the detention that determines whether habeas corpus can issue to secure the freedom of a detained person as guaranteed by art 5(2) of our Constitution.

[42] I mentioned earlier that it is not inimical to our constitutional jurisprudence to refer to Indian and Irish jurisprudence. In this regard, I recall the commentary by Sir Ivor Jennings to the draft of the FC where he indicated

A that the drafters of our FC drew inspirations from the written Constitutions of Ireland, India and the United States (among others).

[43] It is important to note that the United Kingdom's unwritten constitution does not contain written guarantees of protection for
B fundamental rights. Neither does it have a constitutionally ordained enforcement mechanism. Whereas in Malaysia, we have these protections in art 4(1) of our FC read together with Part II (Fundamental Liberties) and supplemented by para 1 of the Schedule to the CJA 1964.

C **[44]** Accordingly, it is my respectful view that the smaller benches in *Faizal bin Haris* and later cases ought not to have confined and restricted themselves to the jurisprudence of English law in this otherwise wide area of our constitutional law.

D **[45]** The constitutional authority upon which the court derives its power of review over preventive detention is art 5(2) of the FC. For completeness, the provision is reproduced below:

> (2) Where complaint is made to a High Court or any judge thereof that a person is
E being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.

[46] Learned counsel for the appellants submitted that art 5(2) was taken
F from art 40(4)(2) of the Irish Constitution 1937 which provides as follows:

> Upon complaint being made by or on behalf of any person to the High Court or any judge thereof alleging that such person is being unlawfully detained, the High Court and any and every judge thereof to whom such complaint is made shall forthwith enquire into the said complaint and may order the person in whose
G custody such person is detained to produce the body of such person before the High Court on a named day and to certify in writing the grounds of his detention, and the High Court shall, upon the body of such person being produced before that Court and after giving the person in whose custody he is detained an opportunity of justifying the detention, order the release of such person from such detention unless
H satisfied that he is being detained in accordance with the law.

[47] The submission made by learned counsel is not without basis. Sir Ivor Jennings in commenting on draft art 3(2) of the FC which later came to be the present art 5(2) had this to say:

I
> (2) is taken with verbal amendments from Eire 40(4)(b). It has not been thought necessary to include 40(4)(c). 'Habeas corpus' need not be suspended in time of emergency, because emergency regulations, which will have the force of law, may authorise detention without trial, and no provision is being inserted corresponding to India 22 or Pakistan 7.

[48] By way of observation, the above comment suggests that the right to habeas corpus is not excluded even if art 150 and by extension art 149 expressly exclude art 5.

[49] Upon reading the two provisions (Malaysian and Irish) side by side, they are substantially the same and thus Irish jurisprudence on the subject is of strong persuasive authority given our drafters' reference to it. Similarly, the Indian position would be of high persuasive authority in light of art 22 (to which the drafters also referred) as well as arts 32 and 226 of the Indian Constitution upon which para 1 of the Schedule to the Malaysian CJA 1964 is mirrored.

[50] The Irish Courts have interpreted their art 40(4)(2) as follows in *The State (at the Prosecution of Robert Trimbole otherwise known as Michael Hanbury) v The Governor of Mountjoy Prison* [1985] IR 550, at pp 571–572:

> In the course of his judgment on this application the learned trial judge held that the purported arrest of the prosecutor on the 25th October, 1984, was a conscious and deliberate violation of his constitutional rights and there has been no appeal against that finding. The consequence of and the attitude of the courts to a conscious and deliberate violation of constitutional rights has been laid down in a number of cases. In *The State (Quinn) v Ryan* [1965] IR 70, which was concerned with the detention and deportation of a person in such a manner as to prevent him having access to the court for the purpose of initiating an enquiry as to the legality of his detention under art 40 of the Constitution, Ó Dálaigh CJ in a judgment with which the other members of this Court agreed, at p 122, stated as follows:
>
> > It was not the intention of the Constitution in guaranteeing the fundamental rights of the citizen that these rights should be set at nought or circumvented. The intention was that rights of substance were being assured to the individual and that the Courts were the custodians of these rights. As a necessary corollary it follows that no one can with impunity set these rights at nought or circumvent them, and that the Courts' powers in this regard are as ample as the defence of the Constitution requires. Anyone who sets himself such a course is guilty of contempt of the Courts and is punishable accordingly.

[51] And, of the many Indian authorities advanced before us, it is sufficient to only refer to two of them. The first is *Vimal Kishore Mehrotra v State of Uttar Pradesh And Anr* AIR 1956 All 56, where at p 59, the court held as follows:

> The learned Deputy Government Advocate argued that even if there was non-compliance with Clause (1) of Article 22 of the Constitution at one time, that does not render the present detention of the petitioner unlawful. Reliance was placed upon the case of *Ram Narayan Singh v State of Delhi* AIR 1953 SC 277 (E). In that case their Lordships of the Supreme Court held that, in habeas corpus proceedings *the Court is to have regard to the legality or otherwise of the detention at the time of the return* and not with reference to the institution of the proceedings. In the present

A case the writ petition was moved on 23–5–1955. This Court fixed 27–6–1955 as the date of the return. We have therefore, to consider whether the petitioner's detention in jail on 27–6–1955 was unlawful. (Emphasis added.)

B **[52]** The other is the judgment of the Indian Supreme Court in *Kanyu Sayal v District Magistrate, Darjeeling* 1974 AIR 510 ('Kanyu Sayal'), at pp 512–513:

It is now well settled that the earliest date with reference to which the legality of detention challenged in a habeas corpus proceeding may be examined is the date on which the application for habeas corpus is made to the Court. This Court speaking through Wanchoo, J, (as he then was) said in *AK Gopalan v Government of India* (1966) 2 SCR 427 AIR 1966 SC 816:

C

> It is well settled that in dealing with the petition for habeas corpus the Court is to see *whether the detention on the date on which the application is made to the Court is legal*, if nothing more has intervened between the date of the application and the date of hearing.

D

In two early decisions of this Court, however, namely, *Naranjan Singh v State of Punjab* 1952 SCR 395 AIR 1952 SC 106 and *Ram Narain Singh v State of Delhi* 1953 SCR 652 AIR 1953 SC 277 a slightly different view was expressed and that view was reiterated by this Court in *BR Rao v State of Orissa* AIR 1971 SC 2197 where it was said:

E

> In habeas corpus the Court is *to have regard to the legality or otherwise of the detention at the time of the return* and not with reference to the institution of the proceedings.

F And yet in another decision of this Court in *Talib Husain v State of Jammu & Kashmir* AIR 1971 SC 62 Mr Justice Dua, sitting as a Single Judge, presumably in the vacation, observed that 'in habeas corpus proceedings the Court has to consider *the legality of the detention* on the date of the hearing'.

Of these three views taken by the Court at different times, the second appears to be

G more in consonance with the law and practice in England and may be taken as having received the largest measure of approval in India, though the third view also cannot be discarded as incorrect, because an inquiry whether the detention is legal or not at the date of hearing of the application for habeas corpus would be quite relevant, for the simple reason that if on that date the detention is legal, the Court

H cannot order release of the person detained by issuing a writ of habeas corpus. But, for the purpose of the present case, it is immaterial which of these three views is accepted as correct, for it is clear that, whichever be the correct view, *the earliest date with reference to which the legality of detention may be examined is the date of filing of the application for habeas corpus* and the Court is not, to quote the words of Mr Justice Dua in *BR Rao v State of Orissa* AIR 1971 SC 2197 'concerned with a

I date prior to the initiation of the proceedings for a writ of habeas corpus. (Emphasis added.)

[53] Malaysian authorities have also taken the same stance prior to *Faizal bin Haris*. For instance, in *Theresa Lim Chin Chin & Ors v Inspector General of*

Police [1988] 1 MLJ 293 ('Theresa Lim'), at p 296, the Supreme Court observed:

> To show further that evidence or information relating to arrests and detentions, either at the initial stage, or in pursuant to a ministerial order, is excluded from public disclosure is s 16, which says that the Minister, or any member of an Advisory Board, or any public servant shall not be required to disclose facts or to produce documents which he considers to be against the national interest to disclose. Encik Sri Ram contended that this section is only confined to the provision of 'this chapter', and since the chapter under which s 16 is enacted is preventive detention pursuant to a ministerial order under s 8, it therefore cannot apply to the arrest at the initial stage pursuant to police power under s 73. This argument could only be right if we accept that there are two preventive detentions. We do not accept that argument. *We regard that arrest and detention by the police and detention pursuant to a ministerial order or further detention after the matter has been considered by the Advisory Board as one continuous process beginning with the initial arrest and detention under s 73*. We accept that the initial arrest and detention may or may not result in the issuing of the ministerial order of detention under s 8, but nevertheless, it is within one scheme of the preventive detention legislation. (Emphasis added.)

[54] The judgments in *Kanyu Sayal* and *Theresa Lim* coherently flow with the line of reasoning adopted by this court in *Ezam*. The foregoing authorities establish the proposition that when a person is detained, the legality of his detention is to be adjudicated by reference to the date the application for a writ of habeas corpus is filed. The detaining authorities are not permitted to 'shift the goal post' — so to speak — by alleging that further or subsequent detentions have been made with a view to render the argument on the impugned detention academic. In other words, the detaining authority cannot rely on subsequent detentions to circumvent the illegality of the initial remand or detention under challenge at the time of filing of the writ of habeas corpus. Accepting such an argument would amount to condoning an abuse of the process of the court and would unduly narrow the interpretation of art 5(2) — a safeguard of a fundamental liberty — against settled constitutional cannons of interpretation. It would also render the safeguard in art 5(2) illusory.

[55] Our jurisprudence has always been that it is the detenu who is allowed to benefit from every technical error made by the detaining authorities and not the other way around (see *Ng Hong Choon v Timbalan Menteri Hal Ehwal Dalam Negeri & Anor* [1994] 3 MLJ 285 at pp 293–294; [1994] 4 CLJ 47 at p 55 and *Re Datuk James Wong Kim Min* [1975] 2 MLJ 244 at p 251; [1976] 1 LNS 129).

[56] Given the weight of authorities, I hold with respect that *Ezam* is the correct decision and the one that ought to be followed. *Faizal bin Haris*, *Rajanderan* and other cases such as *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2003] MLJU 841; [2004] 1 CLJ 81 and *Muhammad Jailani bin Kasim*

v Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors [2006] 6 MLJ 403; [2006] 4 CLJ 687 (and any other related decisions) that came after and departed from *Ezam* are no longer good law and cannot be relied upon for the academic point raised by the respondents.

[57] It follows that the respondents' preliminary objection that the present application for habeas corpus is academic, is bereft of any merit. The preliminary objection is accordingly dismissed.

[58] With that, I will now proceed to analyse the rivalling contentions in respect of s 4 of the POCA 1959 that forms the substantive legal basis for the first remand.

Section 4 of the POCA 1959, Act A704 and art 121(1) read with art 4 of the FC

[59] In advancing his case on the unconstitutionality of s 4 of the POCA 1959, learned counsel for the appellants posited that the constitutional amendment to art 121(1) of the FC vide the Amendment Act A704 effective on 10 June 1988 is a nullity because it reduces the judicial arm of government to a subordinate or subjugate of Parliament. Judicial power is in turn a 'basic structure' of the FC and accordingly Parliament had no authority to do that. As such, the constitutional validity of s 4 of the POCA 1959 must be tested against art 121 as it stood before 10 June 1988. And, since s 4 of the POCA 1959 subordinates the judicial power of the Federation to the Executive arm of government (specifically the attorney general cum public prosecutor and the police), it is in that vein, unconstitutional.

[60] In this regard, I shall deal firstly, with the concept of the basic structure doctrine and the post-amendment art 121(1) and as a consequence, Act A704.

[61] Article 121(1) of the FC, pre-amendment, provided as follows:

> 121 *Judicial power of the Federation*
>
> (1) Subject to Clause (2), the judicial power of the Federation shall *be vested in two High Courts of co-ordinate jurisdiction and status*, namely —
>
> (a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and
>
> (b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine ...
>
> and in such inferior courts as may be provided by federal law. (Emphasis added.)

[62] The post-amendment art 121(1) provides as follows: A

> 121 *Judicial power of the Federation*
>
> (1) There shall be two High Courts of co-ordinate jurisdiction and status, namely —
>
> (a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and B
>
> (b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine ... C
>
> and such inferior courts as may be provided by federal law; *and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law*. (Emphasis added.) D

[63] The change complained of in all cases in which this issue has arisen is that the words 'shall be vested' in the pre-amendment art 121(1) were removed. And, that the insertion of the words 'the High Courts and inferior Courts shall have jurisdiction and powers as may be conferred by or under federal law' have effectively subordinated judicial power to Parliament. E

[64] It could be argued that the above words alone do not give rise to such an interpretation of subordination. The prime source of these complaints in fact arises from, among other decisions, the judgment of this court in *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1 ('Kok Wah Kuan') in particular, the following observations of Abdul Hamid Mohamad PCA (as he then was): F

> [10] There was thus a definitive declaration that the judicial power of the Federation shall be vested in the two High Courts. So, if a question is asked 'Was the judicial power of the Federation vested in the two High Courts?' The answer has to be 'yes' because that was what the Constitution provided. Whatever the words 'judicial power' mean is a matter of interpretation. Having made the declaration in general terms, the provision went on to say 'and the High Courts ... shall have jurisdiction and powers as may be conferred by or under federal law.' In other words, if we want to know what are the specific jurisdiction and powers of the two High Courts, we will have to look at the federal law. G H
>
> [11] After the amendment, there is no longer a specific provision declaring that the judicial power of the Federation shall be vested in the two High Courts. What it means is that there is no longer a declaration that 'judicial power of the Federation' as the term was understood prior to the amendment vests in the two High Courts. If we want to know the jurisdiction and powers of the two High Courts we will have to look at the federal law. If we want to call those powers 'judicial powers', we are perfectly entitled to. But, to what extent such 'judicial powers' are vested in the two High Courts depend on what federal law provides, not on the interpretation the I

A term 'judicial power' as prior to the amendment. That is the difference and that is the effect of the amendment. Thus, to say that the amendment has no effect does not make sense. There must be. The only question is to what extent?

B **[65]** In that vein, arguments have since flooded this court for the position that Act A704 is unconstitutional. There has been no authoritative decision from this court declaring the post-amendment art 121(1) of the FC unconstitutional. The two recent pronouncements of this court in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561; [2017] 5 CLJ 526 ('Semenyih Jaya') and *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545; [2018] 3 CLJ 145 ('Indira Gandhi') declared that the post-amendment art 121(1) had no effect of subordinating the Judiciary to Parliament without striking down Act A704. This was affirmed, to some extent by a nine-justices bench in *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1 ('Alma Nudo').

C

D

E **[66]** In *Semenyih Jaya* and *Indira Gandhi*, this court observed that 'judicial power' is a basic structure of the FC and cannot therefore be removed. It is in this context and in light of the arguments that I proceed to examine the history of the basic structure doctrine ('BSD'). But before I do that, for the record, the majority judgments of this court in *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 1 MLJ 750; [2021] 2 CLJ 579 ('Maria Chin') and *Rovin Joty a/l Kodeeswaran v Lembaga Pencegahan Jenayah & Ors and other appeals* [2021] 2 MLJ 822; [2021] 4 CLJ 1 ('Rovin Joty') attempted to unravel the BSD although both the appellants and the respondents in these two cases accepted that the BSD is part of our law and they were on common ground that *Semenyih Jaya, Indira Gandhi* and *Alma Nudo* correctly propounded the law on judicial power and on the BSD. To clarify, the issue in *Maria Chin* and *Rovin Joty* was essentially whether Parliament could exclude judicial review *remedies* from judicial power of the courts and whether the same forms part of the BSD, not whether the BSD applies to our FC.

F

G

H **[67]** In holding that the BSD does not apply to our FC, the majority in *Maria Chin* and *Rovin Joty*, with the greatest of respect, decided on a point which parties were not at variance and which point was not therefore an issue for the court's determination. The majority decided that the BSD has no application to our FC on their own volition, contrary to the position taken by the parties in those cases. It follows that the decisions of the majority in *Maria Chin* and *Rovin Joty* that the BSD does not exist in our FC do not form the ratio decidendi as such, and cannot be treated as having any binding effect on subsequent cases.

I

[68] Now, on to the BSD which is often attributed to the Supreme Court of India. The concept of the doctrine itself however is not solely the creation of the Indian Courts but perhaps more attributable in principle to the *Grundnorm* theory developed by an Austrian jurist, Hans Kelsen in his 'Pure Theory of Law'.

[69] Kelsen lived at a time when the many States in Europe gained independence and started drafting their own written constitutions. He himself was responsible for the drafting of the Austrian Constitution, and in recognition of his work, was appointed to Austria's constitutional court in the later part of his life. Although it is unclear to what extent Kelsen had a hand in drafting the Constitution of Germany, art 79 of it, which caters for the amending procedure, provides as follows:

> Article 79: [Amendment of the Basic Law]
>
> 1. This Basic Law may be amended only by a law expressly amending or supplementing its text. In the case of an international treaty regarding a peace settlement, the preparation of a peace settlement, or the phasing out of an occupation regime, or designed to promote the defence of the Federal Republic, it shall be sufficient, for the purpose of making clear that the provisions of this Basic Law do not preclude the conclusion and entry into force of the treaty, to add language to the Basic Law that merely makes this clarification.
>
> 2. Any such law shall be carried by two thirds of the Members of the Bundestag and two thirds of the votes of the Bundesrat.
>
> 3. Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 *shall be inadmissible*. (Emphasis added.)

[70] Articles 1–20 of the German Constitution refer to Basic Rights (akin to Part II of our FC) and art 79(3) quite clearly stipulates that no amendments by virtue of the legislative process are admissible in respect of those provisions.

[71] Reverting to Kelsen's theory, it postulates that the *Grundnorm* is the 'First Constitution' and is presupposed to be binding as the basis for validating all law. The *Grundnorm* may be perceived as the 'higher order' which validates even the Constitution. See: Julius Cohen, *The Political Element in Legal Theory: A Look at Kelsen's Pure Theory*, [1978] 88(1) Yale LJ 1, at p 12.

[72] In the Malaysian context, it ought to be understood that the FC is itself a political document arising from the most significant of political negotiations giving life to the Federation of Malaya and later, Malaysia. Unlike the Indian Constitution which was drafted and passed by the Constituent Assembly, our FC is not a document devised by selected representatives, but one negotiated for us by our founding fathers with the colonial power at the time. Changing

the basic features of the FC would result in a change of the *Grundnorm* or the first Constitution of this country and thus effectively eliminate the very foundation of Malaysia itself. That in essence, is the thrust of the BSD.

[73] In India, the BSD was finally recognised and applied in its landmark decision in *Kesavananda Bharati v State of Kerala & Anor* AIR 1973 SC 1461; (1973) 4 SCC 225 ('Kesavananda') where it held that the Indian Parliament's amending power under art 368 is not absolute, and is subject to the condition that any purported amendments must not destroy the basic features of the Indian Constitution. A primary feature of the Indian Supreme Court's analysis centred around the Preamble to the Indian Constitution. Our FC does not have a preamble.

[74] In Malaysia, the Indian notion of the BSD was rejected in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 ('Loh Kooi Choon'). It was raised subsequently in *Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70 ('Phang Chin Hock'). Post *Phang Chin Hock*, there exist other cases which discuss the BSD issue prior to *Semenyih Jaya* and *Indira Gandhi*. For this discussion however, reference to *Loh Kooi Choon* and *Phang Chin Hock* is sufficient given the line of argument of learned counsel for the appellants.

[75] The main bone of contention arose from the following observations of Raja Azlan Shah FJ (as His Royal Highness then was) in *Loh Kooi Choon* at p 190:

> This reasoning, in my view, is based on the premise that the Constitution as the supreme law, unchangeable by ordinary means, is distinct from ordinary law and as such cannot be inconsistent with itself. It is the supreme law because it settles the norms of corporate behaviour and the principle of good government. This is so because the Federation of Malaya, and later, Malaysia, began with the acceptance of the Constitution by the nine Malay States and the former Settlements of Penang and Melaka, by the acceptance of it by Sabah and Sarawak that entered the Federation in 1963, as 'the supreme law of the Federation ... (cl 1 of art 4). It is thus the most vital working document which we created and possess. If it is urged that the Constitution is on the same level with ordinary law, then the Constitution is an absurd attempt on the part of the framers, to limit a power, in its own nature illimitable. In the context of cl (1) of art 160, 'law' must be taken to mean law made in exercise of ordinary legislative power and not made in exercise of the power of constitutional amendment under cl (3) of art 159, with the result that cl (1) of art 4 does not affect amendments made under cl (3) of art 159.

[76] This similar line of reasoning was adopted by Suffian LP in *Phang Chin Hock* where at p 72 His Lordship observed that:

> In our judgment, in construing art 4(1) and art 159, the rule of harmonious construction requires us to give effect to both provisions and to hold and we

accordingly hold that Acts made by Parliament, complying with the conditions set out in art 159, are valid even if inconsistent with the Constitution, and that a distinction should be drawn between on the one hand Acts affecting the Constitution and on the other hand ordinary laws enacted in the ordinary way. It is federal law of the latter category that is meant by law in art 4(1); only such law must be consistent with the Constitution.

[77] Learned counsel for the appellants pointed to certain inconsistencies in the two judgments and their contradicting reliance on Indian authorities. I do not think that those supposed discrepancies need to be examined in such minute detail. It is sufficient to consider only how arts 4(1) and 159(1) respectively of the FC ought to be read together.

[78] From what I can gather, the opinion of the two benches in *Loh Kooi Choon* and *Phang Chin Hock* appears to be this. 'Law' as appearing in art 4(1) of the FC means the same thing as 'federal law' in art 159(1) — otherwise known as 'ordinary law'. By confining the definition of 'law' in art 4(1) to simple 'ordinary law', a law amending the FC is not caught by the definition of 'ordinary law' and thus, any amendment to the FC cannot by virtue of that interpretation be taken to conflict with art 4(1).

[79] With respect, it will be noted that nowhere in the FC is the term 'ordinary law' employed or defined. Hence, such a strained reading of arts 4(1) and 159(1) of the FC is not supported by the very text of the FC. For ease of reference, the said provisions are reproduced below:

Article 4(1)

This Constitution is the supreme law of the Federation and *any law* passed after Merdeka Day which is inconsistent with *this Constitution* shall, to the extent of the inconsistency, be void.

Article 159(1)

Subject to the following provisions of this Article and to Article 161E, *the provisions of this Constitution* may be amended by *federal law*. (Emphasis added.)

[80] Article 160 defines 'law' as thus:

'law' includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof ...

[81] 'Federal law' is in turn defined in the same article as follows:

'federal law' means —

A (a) any existing law relating to a matter with respect to which Parliament has power to make laws, being a law continued in operation under Part XIII; and

(b) any Act of Parliament;

B **[82]** Upon juxtaposing arts 4(1) and 159(1) on art 160, it is apparent that 'law' has a broader meaning than 'federal law'. The only limiting factor in art 4(1) are the words 'any law passed' which suggest that it is confined to only written law as may be passed by Parliament or the State Legislatures. Nevertheless, even with the limitation imposed on 'law' by the word 'passed', C art 4(1) remains the more broadly drafted provision than art 159(1). 'Federal law' in art 159(1) would also have to be passed. But while art 4(1) uses 'any law', art 159(1) uses only 'federal law', an even more restricted and constitutionally defined term than 'any law'.

D **[83]** It might be added that arts 4(1) and 159(1) remain unchanged and unamended from Merdeka Day. The phraseology of both provisions is thus per the original intent of the drafters of the FC.

E **[84]** The other point to note is that art 159(1) uses the words 'provisions of this Constitution' whereas art 4(1) uses the words 'this Constitution'. The words 'this Constitution' in art 4(1) suggest something wider than the words 'the provisions of this Constitution' as employed in art 159(1) and even the post-amendment art 121(1). It is an elementary canon of construction that F when interpreting a statute or a constitutional provision, where words are employed differently in different provisions, they were meant to refer to different things. The underlying rationale is that the FC remains supreme and any law which is inconsistent with it is void. This may include any constitutional amendment effected via federal law inconsistent with the FC G generally. To my mind, this is the underlying rationale for the position taken by this court in *Semenyih Jaya* and *Indira Gandhi* when it referred to BSD in overruling its prior decision in *Kok Wah Kuan*.

[85] By virtue of the above, with the greatest of respect, I am of the view that H the reading of the word 'law' in art 4(1) as being the same as 'federal law' in art 159(1) is untenable. Article 159(1) allows Parliament to pass law (having met the requisite numbers and other conditions) to amend the FC. Article 4(1) on other hand confers supreme status to the FC and prevents all laws that are inconsistent with it from being enacted to the extent of rendering them void. In I this sense, federal law, even law to the extent that it seeks to amend the FC is caught by the pervading reach of art 4(1).

[86] As gleaned earlier, art 4(1) has two limbs to it conjoined by the word 'and'. The first part of it declares that the FC is supreme. It does that not say

that any particular provision of it is supreme, rather 'this Constitution is the supreme law of the Federation.' This part is not merely a feeble declaration if we consider Kelsen's postulated theory of *Grundnorm*.

[87] The above also relates directly to the concept of constitutionalism a principle which itself validates the FC. One author, Larry Backer explained it as follows in Larry Backer, *From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power Systems* 113(3) Penn State Law Review 671, at p 676, as follows:

> A constitution without legitimacy is no constitution at all. It is outside the law in the sense that it ought to be respected by the community against which it is applied ... Legitimacy is a function of values, which in turn serve as the foundation of constitutionalism.
>
> Constitutionalism thus might be understood as a systematization of thinking about constitutions grounded in the development since the mid-20th century of supranational normative systems against which constitutions are legitimated. Communities of nations can rely on that systematization to legitimate, in turn, their actions against non-legitimate governments under principles of international law, or against which the populace can legitimately rebel. Constitutions are distinguished from constitutionalism — the latter serving as a means of evaluating the form, substance, and legitimacy of the former.

[88] This does not mean that any doctrine, certainly not an imported foreign doctrine, was or is more supreme than the FC. What it merely means is that the FC's drafters had in mind certain basic principles which ought to form the bedrock of this country and that under art 159(1), Parliament may amend certain provisions of it without amending the central tenets of 'this Constitution'. This is a safeguard as couched in the wide language of the first limb of art 4(1) to cast away any attempt to cause the FC to implode on itself by abuse of the legislative process. Viewed from this lens, our art 4(1) encapsulates substantially the same principle contained within art 79 of the Constitution of Germany.

[89] The effect of the first limb of art 4(1) in declaring itself supreme is therefore that the government, all its branches and its subsidiary bodies and agents are bound by the larger dictates and parameters established not only by the FC but the circumstances giving rise to its creation.

[90] Purely by way of analogy to elaborate my view, the Supreme Court in *Che Omar bin Che Soh v Public Prosecutor and another appeal* [1988] 2 MLJ 55 when construing art 3(1) of the FC did not read that provision literally but worked to understand it within the larger backdrop of the constitutional history of this country as evidence of the intention of its drafters. For clarity, Salleh Abas LP observed as follows at p 56:

> The question here is this: was this the meaning intended by the framers of the Constitution? For this purpose, it is necessary to trace the history of Islam in this country after the British intervention in the affairs of the Malay States at the close of the last century.
>
> ...
>
> In our view, it is in this sense of dichotomy that the framers of the Constitution understood the meaning of the word 'Islam' in the context of art 3. If it had been otherwise, there would have been another provision in the Constitution which would have the effect that any law contrary to the injunction of Islam will be void. Far from making such provision, art 162, on the other hand, purposely preserves the continuity of secular law prior to the Constitution, unless such law is contrary to the latter ...

[91] A vital aspect of this in terms of the design of the FC is its drawing of the framework from the Westminster style separation of powers with a completely independent Judiciary as opposed to the fused Legislative and Executive branches. Even Raja Azlan Shah FJ accepted this feature as constituting the FC's basic concepts. In *Loh Kooi Choon*, His Lordship said as follows at p 188:

> The Constitution is not a mere collection of pious platitudes. It is the supreme law of the land embodying three *basic concepts*: One of them is that the individual has certain fundamental rights upon which not even the power of the State may encroach. The second is the distribution of sovereign power between the States and the Federation, that the 13 States shall exercise sovereign power in local matters and the nation in matters affecting the country at large. *The third is that no single man or body shall exercise complete sovereign power, but that it shall be distributed among the Executive, Legislative and Judicial branches of government, compendiously expressed in modern terms that we are a government of laws, not of men.* (Emphasis added.)

[92] The second aspect of art 4(1) is the portion of it which stipulates that all laws passed that are inconsistent with the FC are void. This, in my view, constitutes constitutional judicial review. Judicial review is usually understood in its administrative law context. But when used in a constitutional context, it means something wider (see *Huddart Parker & Co Pty Ltd & Appleton v Moorehead* (1909) 8 CLR 330 at p 357; *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311 ('Yap Peng') at p 317. See also *Marbury v Madison* (1803) 1 Cranch 137 ('Marbury'); *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112 at p 113; [1976] 1 LNS 3 and *Gerald Fernandez v Attorney-General, Malaysia* [1970] 1 MLJ 262 at p 264).

[93] The FC is not self-executing and this is why the Judiciary is the mechanism and device through which its supremacy is upheld. If a law is void, it is solely the superior Judiciary that has the power to strike it down as being so void. The exercise of this power to strike down legislation (even legislation that seeks to make amendments inimical to the supremacy of the FC) is thus not

judicial supremacy but a fundamental aspect of the second limb of art 4(1) as entrusted to the Superior Judiciary by the drafters of the FC. This is also recorded in the Reid Commission Report 1957, as follows:

> 161. ... The guarantee afforded by the Constitution is the supremacy of the law and the power and duty of the Courts to enforce these rights and to annul any attempt to subvert any of them whether by legislative or administrative action or otherwise. It was suggested to us that there should also be written into the Constitution certain principles or aims of policy which could not be enforced by the Courts. We do not accept this suggestion. Any guarantee with regard to such matters would be illusory because it would be unenforceable in law ...

[94] The above analysis leads me to the following conclusion. In Malaysia, we have the doctrine of constitutional supremacy as ingrained in art 4(1). While the Indian Courts had to create and apply the BSD primarily by reference to the Preamble of their written constitution, ours (the doctrine of constitutional supremacy) was bequeathed to us by our founding fathers in art 4(1). In this regard, it is my respectful view that there is not even a need for us to adopt what is categorised as an Indian concept of the BSD. To say that our FC does not have any basic structure or basic concept is incorrect. We have at least three basic concepts as stated by Raja Azlan Shah FJ in *Loh Kooi Choon*. As per the advice of this court in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333 at para 8, as to what exactly the Malaysian doctrine details, our courts should be free to develop it on the facts of each case.

[95] In other words, we need not look elsewhere to know that basic structure or basic concept, whatever term one may want to use, is engraved within the very fabric of our art 4(1). For the purposes of these appeals, it is sufficient to know that caught within the definition of constitutional supremacy and the essence of the FC is the notion of separation of powers. Any attempt by federal law to override or undermine this concept is inconsistent with the FC and thus any federal law to the extent that it seeks to do that is void. This is supported in the words of Raja Azlan Shah FJ in *Loh Kooi Choon* above-cited and in the following dictum of Lord Steyn in *State of Mauritius v Khoyratty* [2006] 2 WLR 1330 at pp 1337–1338:

> The idea of a democracy involves a number of different concepts. The first is that the people must decide who should govern them. Secondly, there is the principle that fundamental rights should be protected by an impartial and independent judiciary. Thirdly, in order to achieve a reconciliation between the inevitable tensions between these ideas, a separation of powers between the legislature, the executive, and the judiciary is necessary.

[96] With the greatest of respect, I do not therefore think that it is correct to say that 'judicial power' is merely a 'statutory power' which may be abridged or curtailed by Parliament. The reasoning in this judgment and the proper

A construction of arts 4(1) and 121 in light of our historical records belies that strained method of interpretation. The power of constitutional review is inherent in the courts by constitutional design and it does not disappear simply because it is not provided for by statute and neither can it be lost because a statute says so.

B

[97] In light of these principles, how is the post-amendment art 121(1) and its amending authority, A704, to be construed? In this regard, I respectfully agree with and adopt the judgments of this court in *Semenyih Jaya* and *Indira Gandhi*. They are the most recent decisions of this court which have overruled C *Kok Wah Kuan*. By the doctrine of stare decisis, *Semenyih Jaya* and *Indira Gandhi* ought to be followed. Accordingly, art 121(1) should be read in the sense that the words 'the judicial power of the Federation shall be vested in the two High Courts of co-ordinate jurisdiction and status' still exist despite their D removal from art 121(1) and in the same vein, the words inserted by the 1988 amendment to the extent that the 'the High Courts ... shall have such jurisdiction and powers as may be conferred by or under federal law' as having no effect whatsoever of diminishing or subordinating judicial power to Parliament or declaring Parliament supreme in any way. This is because, by the E spirit of art 121(1) read together with the first and second limbs of art 4(1), judicial power continues to vest in the Superior Courts as otherwise, a fundamental aspect of the FC that is the judicial arm, is rendered obsolete and the FC is unable to maintain its status as the supreme law of the Federation.

F

[98] In simpler terms, because the FC is not self-executing, the duty lies with the Judiciary to give effect to art 4(1) to ensure that the FC remain the supreme law of the Federation. The Judiciary discharges that duty by protecting fundamental rights/liberties guaranteed by the FC and by declaring any law passed which is inconsistent with the FC as void. Now, if the judicial power is G confined to what is conferred or given by Parliament and if Parliament choose to enact a law which disallows the courts to scrutinize acts of constitutional transgressions by the Executive or the Legislative, the notion that the courts are the last bastion of justice would be rendered illusory and nugatory. It follows H that no law is capable of being upheld if its effect is to diminish the basic and essential powers of the Judiciary. Otherwise, the Judiciary could never discharge its duty or responsibility of executing art 4(1). Of course in declaring any law as invalid, regard must also be had to the doctrine of presumption of constitutionality (see *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116 ('Harun Idris') at p 117). I

[99] In my view the present art 121(1) merely restates the constitutional position that has always prevailed in our nation that the jurisdiction and powers of the courts may be arranged by federal law. By way of example, laws

have been enacted and remain enacted to clarify the jurisdiction of the courts such as the right and procedure for appeals in the CJA 1964, the law on limitation in the Limitation Act 1953 and other related statutes, and the scope of locus standi in O 53 of the Rules of Court 2012. Parliament can define and elaborate the jurisdiction of the courts but it cannot legislate to the extent that it violates the constitutional right of judicial review contained within the second limb of art 4(1) that I identified earlier or to the extent that it denudes judicial power which is a part of separation of powers implicit in the design of the FC which reigns supreme.

[100] The post-amendment art 121(1), in other words is constitutionally valid if read harmoniously with the words 'any law passed' in art 4(1) so as to include only constitutionally valid 'federal law'.

[101] The above does not detract from Parliament's power to amend the FC under art 159. The reading down of the 1988 amendment to art 121(1) vide Act A704 is but one example to show that Parliament may amend and has amended the FC without offending the supremacy of it. It can thus be postulated that it was never the post-amendment art 121(1) itself that was unconstitutional, rather the effect of the interpretation given to it by this court in *Kok Wah Kuan* and other related cases which substantially gave rise to the litigation against the constitutional validity of Act A704.

[102] In all this, it must be remembered again that our FC was inspired from other written constitutions such as that of India's and the United States'. The Indian Constitution does not have a supremacy clause like our art 4(1). But, it has art 13 that renders all laws made contrary to Part III (equipollent of our Part II) void while providing judicial remedies in arts 32 and 226. The American constitution is supreme but does not contain a 'striking down' clause. The courts had to infer such a power from their supremacy clause (see generally: *Marbury*). In Malaysia, we have combined all aspects of these powers neatly into art 4(1) and thus, it provides a complete answer to anyone who argues that the FC can be amended by Parliament in any way simply because the procedural requirements have been met without regard to the supremacy of it.

[103] In the circumstances, I believe I have addressed the appellants' argument as to the constitutional validity of Act A704 and the post-amendment art 121(1) and the ensuing argument of it having violated the BSD. At the risk of repetition, we have our own art 4(1) and we would benefit from developing that provision rather than to rely solely on other doctrines and concepts.

[104] Having said that, I do not think that it is ipso facto contrary to our FC, for us to refer to foreign doctrines or jurisprudence, where relevant. In

Malaysia, we have on numerous occasions adopted and do continue to adopt Indian and other foreign concepts. The following are some of the examples:

(a) the doctrine of prospective overruling which stems from American and Indian jurisprudence (see *Yap Peng*) at p 320 affirming the American case of *Linkletter v Walker* 1965 381 US 618 which was cited with approval and applied by the Indian Supreme Court in *IC Golaknath & Ors v State of Punjab* 1967 AIR 1643; 1967 SCR (2) 762);

(b) the doctrine of presumption of constitutionality is another concept which we have developed from English and Indian jurisprudence and which has been deemed to apply to both written and unwritten constitutions (see generally *Harun Idris* and *Shri Ram Krishna Dalmia v Shri Justice SR Tendolkar & Ors* 1958 AIR 538 cited with approval in *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener)* [2004] 2 MLJ 257);

(c) we also have the doctrines of colourable legislation and pith and substance. These concepts were applied affirmatively by the Supreme Court in *Mamat bin Daud & Ors v Government of Malaysia* [1988] 1 MLJ 119 ('Mamat bin Daud'). A reading of that case also suggests that the doctrine was imported into Malaysian constitutional and administrative law;

(d) a further example of an importation of foreign concepts to further understand the breadth of our law is the judgment of this court in *Alma Nudo* where it referred, among others, to international jurisprudence to articulate the test on proportionality as guaranteed by arts 5(1) and 8(1) of the FC; and

(e) another concept is the de facto doctrine which was read into our FC by reference to English and Indian authorities (see *Yong Tshu Khin & Anor v Dahan Cipta Sdn Bhd & Anor and other appeals* [2021] 1 MLJ 478; [2021] 1 CLJ 631). Significant reliance was placed in that case on the judgment of the Indian Supreme Court in *Gokaraju Rangaraju etc v State of Andhra Pradesh* 1981 SCR (3) 474).

[105] The concepts referred to by way of example above do not otherwise have any legislative or constitutional basis for their existence. The courts have instead referred to them on the basis of common law (English, Indian, American and so on). Thus, there is nothing antithetical to our courts referring to the Indian formulation of the BSD in construing the doctrine of constitutional supremacy in art 4(1) of the FC as it is expressly ordained by the FC itself.

[106] And, there is no basis for us to reject outright concepts first or further developed in other jurisdictions whether they be German, Indian, Irish, or

American simply because they are foreign. The assessment on which authorities will apply will always depend on the facts of each case and on the subject-matter under question as well as the differences in our law and the jurisdiction compared to and having regard to our FC's own drafting history and bearing in mind that the said foreign provisions and cases were used as templates by our own founding fathers when drafting our own FC.

[107] Having addressed the constitutional validity of Act A704 and the post-amendment art 121(1) as well as the notion of BSD in Malaysia, I shall now proceed to examine the constitutional validity of s 4 of the POCA 1959 against arts 4(1) and 121(1) of the FC.

Constitutional validity of s 4 of the POCA 1959

[108] In determining the constitutional validity of s 4 of the POCA 1959, I am very much conscious of the fact that POCA 1959 is a specially enacted law dealing with security matters and preventive measures. That said, it was not the intention of the framers of the FC that the courts are disabled from scrutinising specially enacted security or preventive laws. This is apparent from the Reid Commission Report:

> 174. To deal with any further attempt by any substantial body of persons to organise violence against persons or property, by a majority we recommend that Parliament should be authorised to enact provisions designed for that purpose notwithstanding that such provisions may involve infringements of fundamental rights or State rights. It must be for Parliament to determine whether the situation is such that special provisions are required by Parliament but Parliament should not be entitled to authorise infringements of such a character that they cannot properly be regarded as designed to deal with the particular situation. *It would be open to any person aggrieved by the enactment of a particular infringement to maintain that it could not properly be so regarded and to submit the question for decision by the Court*. (Emphasis added.)

[109] In other words, the fact that POCA 1959 is a legislation authorised under art 149 of the FC, does not necessarily render POCA 1959 and/or any of its provision automatically valid or immune from judicial scrutiny. It remains a question for the court to consider constitutional validity when a challenge is made by an aggrieved person against any law even if that law was passed under art 149.

[110] Section 4(1) of the POCA 1959 provides as follows:

> 4 Procedure before Magistrate
>
> (1) Whenever any person is taken before a Magistrate under subsection 3(2) the Magistrate *shall* —

A (a) on production of a statement in writing signed by a police officer not below the rank of Inspector stating that there are grounds for believing that the name of that person should be entered on the Register, remand the person in police custody for a period of twenty-one days; or

B (b) if no such statement is produced, and there are no other grounds on which the person is lawfully detained, direct his release. (Emphasis added.)

[111] Section 4 of the POCA 1959 is couched in imperative language. Where under para (a) a magistrate is produced with a signed statement in writing by a C police officer of a certain rank, the magistrate has no choice but to order the detention for a period of 21 days so long as the procedural requirements of sub-s (1)(a) are complied with.

[112] Next, sub-s (2) provides as follows:

D (2) Any person remanded under paragraph (1)(a) shall, unless sooner released, on or before the expiry of the period for which he is remanded be taken before a Magistrate, who *shall* —

(a) on production of —

E (i) a statement in writing signed by the Public Prosecutor stating that in his opinion sufficient evidence exists to justify the holding of an inquiry under section 9; and

F (ii) a statement in writing signed by a police officer not below the rank of Assistant Superintendent stating that it is intended to hold an inquiry into the case of that person under section 9, order the person to be remanded in custody for a period of thirty-eight days; or

G (b) if no such statements are produced, and there are no other grounds on which the person is lawfully detained, direct his release. (Emphasis added.)

[113] Again, like sub-ss (1), (2) mandatorily requires the magistrate to order H continued detention for a period of 38 days if he or she is met with a statement by the public prosecutor and the police subject to certain other procedural requirements of para (a). In both cases, whether under sub-s 4(1) or 4(2), the magistrate is not otherwise entitled to apply his or her judicial mind nor exercise independent discretion to determine whether the remand application I should be granted. The magistrate is also denied the discretion to decide the length and measure of the detention. He or she is to mechanically allow the first detention for 21 days and the second for 38 days on the express dictation of the police and public prosecutor respectively.

[114] Learned SFC, in an attempt to justify such imperative language, argued that the presence of the magistrate serves as a check and balance and this accordingly, is concomitant with the doctrine of separation of powers. Learned SFC further argued that the magistrate acts in an Executive capacity and not an extension of the judicial arm. To bolster his argument, learned SFC relied on the judgment of this court in *Jaideep Singh Dalip Singh v ASP Mahathir Abdullah Sapawi & Ors* [2018] 3 MLJ 1; [2017] 10 CLJ 145 ('Jaideep') where Raus Sharif PCA (as he then was) said:

> [17] ... In the present case, as stated earlier, the remand order was made by the magistrate pursuant to s 4(1)(a) and 4(2)(ii) of the POCA. In doing so, the magistrate was not exercising his judicial power but rather a power of a detaining authority duly given under the POCA. The POCA is an Act which provides for preventive detention.

[115] With the greatest of respect, the two arguments, namely that the magistrate serves as a check and balance and that the magistrate acts in an Executive capacity materially contradict one another. It is either the magistrate is or is not a member of the Executive and as such, either does or does not exercise judicial power. The argument of learned SFC that the magistrate acts in the Executive capacity and serves as a check and balance with respect, is also flawed. The notion of separation of powers refers to the powers of the different branches of the government and check and balance by one branch over the other. It is not the notion that the same branch of government acts as a check and balance over itself.

[116] In my view, the correct position in law is that the magistrate exercises judicial power. This is because the source of the magistrate's power is derived from art 121(1) of the FC in the words: 'and such inferior courts as may be provided by federal law ... and shall have such jurisdiction and powers as may be conferred by or under federal law'. In this regard, *Jaideep* is not the authority for the proposition that the magistrate does not exercise judicial power but detaining power of the Executive. The constitutional validity of s 4 of the POCA was not raised and thus was not an issue in *Jaideep*. Hence, the decision that the magistrate does not exercise judicial power is not the ratio decidendi of *Jaideep*.

[117] In *Jaideep*, the appellants were detained for 21 days pursuant to remand orders separately issued by the magistrate under s 4(1)(a) of the POCA 1959. The remand orders were then extended for an additional 38 days. The appellants each filed an application for a writ of habeas corpus at the High Court. At the hearing of the applications, the SFC raised a preliminary objection that the applications for habeas corpus adopted by the appellants were not the proper mode of proceeding to mount a challenge on their alleged unlawful detention. The SFC contended that the appellants should have

A proceeded by way of judicial review. The High Court upheld the objection and dismissed the applications for writ of habeas corpus. On appeal, this court reversed the decision of the High Court. This court held that the proper mode for the appellants to seek redress should be by habeas corpus. That is the ratio decidendi of *Jaideep*.

B

[118] *Jaideep* aside, at this juncture, it bears the question: can 'federal law' therefore provide that the magistrate shall have absolutely no discretion in deciding whether remand should be ordered or not, and have absolutely no discretion on the length of it within the radius prescribed by Parliament?

C

[119] This brings into focus the operation of the doctrine of constitutional supremacy housed in art 4(1) of the FC. The second limb of the art 4(1) is not in issue because this case does not concern the abrogation of judicial power on the part of the Superior Courts to exercise their constitutional power of judicial review over Legislative and by extension, Executive acts. The case does however attract the application of the first limb.

D

[120] As highlighted earlier, the FC is supreme. This includes all enumerated provisions and, as recognised by Raja Azlan Shah FCJ in *Loh Kooi Choon*, implicit concepts such as separation of powers ingrained in the historical design of the FC. As found earlier, judicial power remains vested in the courts under art 4(1) and the post-amendment art 121(1) of the FC.

E

F **[121]** Remand is a judicial order and a magistrate making such an order performs a judicial act (see generally *Hassan bin Marsom & Ors v Mohd Hady bin Ya'akop* [2018] 5 MLJ 141; [2018] 7 CLJ 403). The fact that it was ordered under a preventive law, in my view does not change the judicial character of the remand order. At this juncture, I wish to record my observation that neither the now repealed Internal Security Act 1960, the Dangerous Drugs (Special Preventive Measures) Act 1985 nor the Security Offences (Special Measures) Act 2012 make any provision on remand by a magistrate. These preventive laws strictly provide for executive acts to be exercised by the Minister or other enforcement body. POCA 1959 however, provides for remand by a magistrate and under s 4 of the POCA 1959, the magistrate is clearly bound to act upon the dictates of the police and the public prosecutor by use of the imperative word 'shall'. There are two cases to illustrate that this form of 'law' seeking to direct the judiciary or a judicial body to do or omit from doing something upon the dictates of an Executive body without any choice, is a violation of separation of powers.

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[122] The first is the decision of the Supreme Court in *Yap Peng*. In that case, s 418A of the Criminal Procedure Code which vests power in the public prosecutor to decide when and to which court a case ought to be transferred,

was held to be unconstitutional. In this regard, Abdoolcader SCJ most pertinently observed as follows at pp 319–320:

> I cannot but conclude in the circumstances that there is in fact by the exercise of the power conferred by s 418A on the public prosecutor an incursion into the judicial power of the Federation and that any other view would *ex necessitate rei* result in relegating the provisions of art 121(1) vesting the judicial power of the Federation in the curial entities specified to no more than a teasing illusion, like a munificent bequest in a pauper's will. The power of the public prosecutor under s 418A is uncanalised, unconfined and vagrant.
>
> ...
>
> I would accordingly declare that s 418A is in violation of the provisions of art 121(1) and therefore unconstitutional and void under the provisions of art 4(1).

[123] The other case which is directly on point is that of *Semenyih Jaya*. It would be recalled that in that case, s 40D of the Land Acquisition Act 1960 mandatorily bound the High Court judge to the opinion or decision of the lay assessors. Zainun Ali FCJ had this to say:

> [100] In view of s 40D of the Act, a conundrum presents itself in that the discharge of the judicial power and function to determine adequate compensation is now assigned to assessors and not the judge. It is pertinent to note that the act of determining the amount of compensation payable arising out of land acquisition cases involves judicial assessments, for example, whether a particular head of claim is allowed, evidential issues, whether a response to a valuer's report is permitted etc. Hence the power to award compensation in land reference proceedings is a judicial power that should rightly be exercised by a judge and no other.

[124] The ratio decidendi of both cases is that binding judicial bodies to the opinion or whims of non-judicial bodies or more so Executive bodies is wholly inconsistent with the scheme of separation of powers established intrinsically by the FC. The only known exception to this thus far is the judgment of this court in *JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners)* [2019] 3 MLJ 561; [2019] 5 CLJ 569 ('JRI Resources'). In that case, the binding authority of the opinion of the Syariah Advisory Council was not deemed to violate judicial power as the secular Superior Courts were in the first place deemed not to have any power to decide on substantive Syariah or Syariah-related issues. That case therefore remains the only known exception.

[125] These appeals, unlike *JRI Resources* do not fall within that exception. Here, being an inferior court, the magistrate exercises judicial power to consider and order remand and detention.

[126] Based on the foregoing analysis, s 4 of the POCA 1959 in particular sub-ss (1) and (2) cannot be regarded as valid 'federal law' within the meaning of art 121(1) read in light of art 4(1) respectively of the FC. The first limb of art 4(1) declares that the FC is supreme. One of the intrinsic features of the FC is the judicial power of the Federation being vested in the Superior Courts with constitutional sanction afforded to the subordinate courts to exercise some degree of judicial power. By binding the magistrate to the dictates of the Executive in the police and the public prosecutor, the law passed by Parliament seeks to override this particular constitutional feature. As such, sub-s (1) and (2) of s (4) of the POCA 1959 are inconsistent with the Constitution and are void. The presumption of constitutionality has been overcome rendering the said provisions liable to be struck down.

[127] In *Mamat bin Daud*, the Supreme Court was faced with the question on how to deal with a section where certain parts of it are unconstitutional while the other parts of it remain ex facie valid. The court held that if the seemingly constitutionally valid provisions are inseverable from the invalid ones then they are also liable to be struck down together with the offending provisions.

[128] In the instant appeals, the rest of s 4 of the POCA 1959 is so inextricably tied to sub-s (1) and (2) that they cannot exist without the offending parts of s 4. The net effect of this finding is that the whole of s 4 of the POCA 1959 stands unconstitutional and void.

[129] Since the first remand, which formed the initial detention was done on the basis of an unconstitutional 'law', there was accordingly no basis in law to detain the appellants. This effectively means that their life and personal liberty was not deprived in accordance with law under art 5(1) of the FC. Their detention is therefore unlawful and habeas corpus must issue as of right.

Article 149 of the FC and Item 5 of the Schedule to the POCA 1959

[130] For completeness, I also find it necessary to address the appellants' arguments on art 149 of the FC as it is also an issue of constitutional importance. To recapitulate, the appellants were detained under the CGHA 1953 read into POCA 1959 vide Item 5 of its First Schedule. The appellants' argument was that the fact of their detention does not conform to the express requirements of art 149(1)(a). In response, learned SFC contended that this court ought not to restrict itself to merely art 149(1)(a) as POCA 1959 was passed generally under art 149.

[131] Article 149 is contained within Part XI of the FC which relates to the special powers of Parliament against subversion, organised violence, and acts and crimes prejudicial to the public and emergency powers. Under art 149(1),

any law passed in accordance with it is valid notwithstanding the provisions of arts 5, 9, 10 or 13 of the FC and such laws may also be passed beyond the scope of the legislative power of Parliament. These are very broad and overarching powers entrusted to Parliament by the FC.

[132] In this regard, paras (a)–(f) of art 149(1) set out recitals which Parliament is required to include in the offending statute to bring that statute within the purview of art 149 to insulate it from the scrutiny of arts 5, 9, 10 and 13.

[133] In my view, the inclusion of the art 149 recitals in anti-subversion and other such laws serves as a constitutional safeguard ensuring that any such law is properly enacted for the purposes envisaged by that article.

[134] It is a settled principle of constitutional construction that constitutional provisions and laws which safeguard fundamental rights must be read generously and in a prismatic fashion while provisions that limit or derogate from those rights must be read restrictively (see *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301 at para 13).

[135] The most recent authority on the importance of art 149 is the judgment in *Selva Vinayagam a/l Sures v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2021] 1 MLJ 601; [2021] 2 CLJ 29 ('Selva'), where this court through Vernon Ong FCJ most critically observed as follows:

> [33] The purpose of art 149 is to enable Parliament, once any one or more of the six categories of action enumerated under paras (a)–(f) of cl (1) has occurred, to make laws providing not only for its suppression but also for preventing its recurrence. Where such an Act of Parliament confers on the executive to act in a manner inconsistent with arts 9, 10 or 13, the action must be taken bona fide for the purpose of stopping or preventing action of the kind envisaged under the Act (see *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50 at p 54; [1978] 1 LNS 202 (PC)).
>
> [34] Where power is vested in a statutory authority to deprive the liberty of a person on its subjective satisfaction with reference to the specified matters, and if that satisfaction is stated to be based on a number of grounds or for a variety of reasons all taken together, and if some out of them are found to be non-existent or irrelevant, *the very exercise of that power is bad*. Therefore, strict compliance with the letter of the rule of law is the essence of the matter. (Emphasis added.)

[136] The point in that case was that s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 was employed to preventively detain the detenu. This court found that the detention was bad because the appellant acted alone and that was in violation of art 149(1)(a) and (f), which allowed Parliament to make the relevant law on account of action which is prejudicial to public order in Malaysia has been taken and further similar action is being

threatened by 'a substantial body of persons' both inside and outside Malaysia. In construing the provision narrowly, this court held that the detenu (acting alone) was not a 'substantial body of persons' and thus was not caught by the purpose for which the relevant statute was enacted under art 149 (see also paras 50–51 of *Selva*).

[137] This takes me to the recital in POCA 1959. It reads as follows:

> WHEREAS action has been taken and further action is threatened by a substantial body of persons both inside and outside Malaysia to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property;
>
> AND WHEREAS Parliament considers it necessary to stop such action;
>
> NOW, THEREFORE, pursuant to Article 149 of the Federal Constitution IT IS ENACTED by the Parliament of Malaysia as follows ...

[138] The above recital is drawn from art 149(1)(a) which provides:

> 149(1) If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation —
>
> (a) to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property ...

[139] In light of the foregoing, it is untenable to conclude that Parliament intended to refer to all the recitals contained in art 149(1) when the recital in POCA 1959 in fact refers only to para (a). In other words, since Parliament enacted POCA 1959 under para (a) of art 149(1), POCA 1959 has to be construed in accordance with that paragraph. To accept learned SFC's argument in that respect would be to give POCA 1959 a broader interpretation against the weight of settled, recent and high authorities which suggest that the most restrictive approach ought to be taken on a provision which permits derogation from fundamental liberties.

[140] Quite apart from their argument that art 149(1) as a whole is sufficient to sustain Item 5 of the First Schedule to POCA 1959 without regard to the specific selection of only para (a) of art 149(1), the respondents also suggested that the words 'organized violence' in the recital to POCA 1959 do contemplate unlawful gambling and gaming offences. In all fairness to the respondents, there appears to be some support for their contention in the legislative history of the POCA 1959 as it presently stands.

[141] The relevant Minister in stating the government's intention for moving the Bill to amend POCA 1959 in its present form stated as follows (see the Dewan Rakyat *Hansard* (1 October 2013) at pp 44–45):

Peningkatan kes-kes jenayah berat dan jenayah terancang ini sedikit sebanyak telah meningkatkan kebimbangan rakyat akan tahap keselamatan mereka berikutan keseriusan kes-kes jenayah yang berlaku seperti mana yang dilaporkan di dalam media massa iaitu:

(i) penggunaan senjata api yang berleluasa;

(ii) kejadian pembunuhan menggunakan senjata api;

(iii) pergaduhan antara kumpulan ahli-ahli kongsi gelap sesama mereka untuk merebut kawasan;

(iv) perebutan kawasan pengedaran dadah;

(v) pengutipan wang perlindungan;

(vi) sindiket pelacuran; dan

(vii) *sindiket perjudian*.

Kerajaan amat peka akan kebimbangan yang dirasai oleh rakyat, dan mendengar rintihan mereka agar Kerajaan mengambil tindakan segera bagi membanteras aktiviti-aktiviti jenayah berat dan jenayah terancang.

...

Tuan Yang di-Pertua, tanpa undang-undang yang efektif kegiatan jenayah berat dan jenayah terancang tidak dapat dibendung. Tidak dapat dibendung dengan berkesan dan seterusnya akan menjadi ancaman kepada keselamatan negara. Dari aspek sosial selain peningkatan kadar jenayah, golongan pelajar juga akan menjadi sasaran oleh ahli-ahli kongsi gelap sedia ada untuk merekrut ahli-ahli baru bagi menyertai kumpulan mereka. (Emphasis added.)

[142] In short, the Minister suggested that gambling syndicate is one of the reasons why POCA 1959 was eventually amended. In this regard, I recall the decision of House of Lords in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] 1 All ER 810. Most pertinently, Lord Reid opining for the majority observed as follows at pp 814–815:

Construction of the provisions of an Act is for the court and for no one else. This may seem technical but it is good sense. Occasionally we can find clear evidence of what was intended, more often any such evidence, if there is any, is vague and uncertain. If we are to take into account Parliament's intention the first thing we must do is to reverse our present practice with regard to consulting Hansard. I have more than once drawn attention to the practical difficulties that would involve but the difficulty goes deeper. The questions which give rise to debate are rarely those which later have to be decided by the courts. One might take the views of the promoters of the Bill as an indication of the intention of Parliament but any view the promoters may have had about questions which later come before the court will not often appear in Hansard and often those questions have never occurred to the promoters. At best we might get material from which a more or less dubious inference might be drawn as to what the promoters intended or would have intended if they had thought about the matter, and I would think generally be

A dangerous to attach weight to what some members of either House may have said. The difficulties in assessing any reference there might have been in Parliament to the question before the court are such that in my view our best course is to adhere to present practice.

B If we are to refrain from considering expressions of intention in Parliament it appears to me that a fortiori we should disregard expressions of intention by committees or royal commissions which reported before the Bill was introduced. I may add that we did in fact examine the whole of this report — it would have been difficult to avoid that — but I am left in some doubt as to how the committee would have answered some of the questions which we have now to answer, because I do not C think that they were ever considered by the committee.

[143] Perhaps more compelling is the dictum of Lord Wilberforce, who supported the speech of Lord Reid. At p 828, Lord Wilberforce said:

D To be concrete, in a case where a committee prepared a draft bill and accompanies that by a clause commentary, it ought not to be permissible, even if the proposed bill is enacted without variation, to take the meaning of the bill from the commentary. There are, to my mind, two kinds of reason for this. The first is the practical one, that if this process were allowed the courts would merely have to interpret, as in E argument we were invited to interpret, two documents instead of one — the bill and the commentary on it, in particular Annex V, para 13. *The second is one of constitutional principle. Legislation in England is passed by Parliament, and put in the form of written words. The legislation is given legal effect on subjects by virtue of judicial decision, and it is the function of the courts to say what the application of the words used to particular cases or individuals is to be. This power which has been devolved on the* F *judges from the earliest times is an essential part of the constitutional process by which subjects are brought under the rule of law — as distinct from the rule of King or the rule of Parliament; and it would be a degradation of that process if the courts were to be merely a reflecting mirror of what some other interpretation agency might say.* (Emphasis added.)

G

[144] The above dicta of Lords Reid and Wilberforce were made in a jurisdiction where Parliament is supreme. Here, where the FC is supreme, the said dicta must be interpreted with even greater seriousness given the clear and unmingling demarcation between judicial and legislative powers. Accordingly H in this country, the Hansard and the Parliamentary speeches it contains merely serve as an interpretive aid. It is relevant insofar as it helps the court determine any supposed mischief Parliament sought to remedy with a view to resolve, for example, ambiguous interpretation. The Hansard is not otherwise a definitive corpus on what the law actually says or means or for that matter, what it ought I to say or mean.

[145] Statutory construction, and more so constitutional construction is exclusively a matter for the Judiciary. While the Honourable Minister is entitled to express his view that 'organized violence' includes gambling and

gaming offences, the question of construction of those words and whether they can constitutionally include such kinds of offences remain very much a judicial question.

[146] Thus, the only question that remains is whether the CGHA 1953 read into POCA 1959 vide Item 5 of its First Schedule is sufficiently within the scope of the recital stipulated by art 149(1)(a) of the FC, as judicially determined. At face value, it would appear that there is no logical or legal nexus between gaming offences and organised violence. Be that as it may, the appellants cited two judgments of the Indian Courts for the point that gaming and other lesser offences do not constitute organised violence.

[147] The first is the judgment of the Indian Court in *Ajay Gupta v State of Maharashtra* (2014) 3 Bom CR (Cri) 96, where the court observed that two crimes relating to the commission of thefts were not even remotely close to being recognised as movements or actions which would imminently cause alarm or danger or harm.

[148] In another case, *Jalim Chand Saraogi v District Magistrate And Ors* 1972 CriLJ 1599, the Indian Court observed at pp 1601–1602 that the grounds on which the detenu was detained ie activities confined to his organisation of gambling could not be viewed as one which causes public disorder. Neither can it be considered as anything 'subversive, violent, dangerously mischievous or general fear-foreboding'.

[149] With respect, I concur with the above reasoning. If two crimes relating to the commission of thefts were not even remotely close to being recognised as movements or actions which could imminently cause alarm or danger or harm, by extension, gaming offences can hardly be considered anything close to organised violence, though it may perhaps be classified as organised crime. Organised crime is not necessarily equivalent to organised violence. For instance, 'white-collar crime' committed by businesses and government professionals is a non-violent crime. Simply put, by no stretch of the imagination can gaming offences be fathomed as being contemplated by art 149(1)(a) of the FC as something which may cause 'a substantial number of citizens to fear, organised violence against persons or property'. More importantly, apart from stating that 'Tangkapan terhadap Pemohon di bawah Akta tersebut telah dibuat kerana ada sebab untuk mempercayai bahawa ada alasan-alasan yang mewajarkan siasatan di bawah Akta tersebut dilaksanakan ke atas Pemohon kerana penglibatan Pemohon dalam pengelolaan dan penggalakan judi haram sebagaimana yang dinyatakan di Perenggan 5 Bahagian 1, Jadual Pertama Akta tersebut', the respondents made no mention of 'organized violence' in their affidavit.

[150] Applying *Selva*, the consequence is that Item 5 of the First Schedule to POCA 1959 to the extent that it includes gaming offences such as the ones under the CGHA 1953 is ultra vires art 149(1)(a) of the FC which is the recital under which POCA 1959 was enacted, although and I say this without the benefit of argument, it may perhaps be valid had POCA 1959 been enacted under recital (f) of art 149(1) as well, which relates to action prejudicial to public order. The insertion of Item 5 of the First Schedule was effectuated by the Minister pursuant to s 22 of the POCA 1959 in 2014. As this insertion is ultra vires art 149(1)(a) of the FC, it is legally invalid.

[151] For the above reason, the appellants' arrests and detentions under s 4 of the POCA 1959 were unlawful. It follows on this ground as well that the appellants are entitled *ex debito justitiae* to a writ of habeas corpus.

Mala fide

[152] The mala fide issue as submitted by the appellants essentially concerns issue of fact. As my findings of law on the constitutional invalidity of s 4 of the POCA 1959 and the legal untenability of the facts delivered under the invalid Item 5 of the First Schedule have sufficiently dealt with the legality of the detention of the appellants, I find it unnecessary to deal with this point as canvassed.

CONCLUSION

[153] In light of art 5(2) of the FC and the decision of this court in *Ezam*, the present appeals are not academic. In terms of the merits, the legality of the detention of the appellants rests on the constitutional validity of s 4 of the POCA 1959. I have found it to be unconstitutional and void under art 4(1). There is therefore no basis in law for the appellants' detention. As the appellants' right to personal liberty under art 5(1) was not deprived in accordance with law, their detentions are unlawful.

[154] Further, the statement of facts delivered to the magistrate, on the alleged offences for which the appellants were arrested ie gaming offences under the CGHA 1953, was inconsistent with the recital in POCA 1959 drawn from art 149(1)(a). This renders the grounds for the detention invalid and their resulting detention unlawful.

[155] In the circumstances, the respondents have not met their legal burden to justify the lawfulness of the appellants' detention. The appeals are allowed, the order of the High Court is set aside and the appellants' application for a writ of habeas corpus is allowed. It is hereby directed that each of the appellants be released from custody forthwith.

[156] My learned sister Justice Rhodzariah Bujang has read this judgment in draft and has agreed with it. A

Vernon Ong FCJ:

[157] I have had the benefit of perusing the separate written judgments of Tengku Maimun Tuan Mat CJ and Hasnah Mohammed Hashim FCJ. B

[158] I do not think that it is necessary to set out the background to the three appeals as they have been comprehensively dealt with in the aforesaid written judgments. Suffice it to say that the habeas corpus applications are directed against the legality of the remand orders made by the magistrate pursuant to sub-s 4(1) of the Prevention of Crime Act 1959 ('the POCA 1959') under which the appellants were remanded for a period of 21 days for their alleged involvement in an on-line gaming syndicate ('sindiket judi atas talian'). There are five common issues that were canvased in these appeals. C D

FIRST ISSUE — WHETHER THE APPEALS ARE ACADEMIC?

[159] The first issue is a preliminary point and it is this: it is the respondents' argument that the three appeals are academic — because by the time the habeas corpus application came up for hearing in the High Court, the sub-s 4(1) remand order had already been superseded by another remand order of 38 days under sub-s 4(2) of the POCA 1959. As such, there was no live issue before the High Court to adjudicate. The respondents' preliminary objection in the High Court was upheld by the learned judicial commissioner. E F

[160] On this preliminary issue, I am in agreement with the erudite views expressed by the learned Chief Justice in her written judgment. Accordingly, I would also overrule the respondents' preliminary objection. G

SECOND ISSUE — WHETHER S 4 OF THE POCA 1959 IS UNCONSTITUTIONAL?

[161] Whilst my learned sisters Zaleha Yusof and Hasnah Mohammed Hashim FCJJ and I are in agreement that s 4 of the POCA is not unconstitutional, our reasons for arriving at this decision are at variance in certain aspects. H

[162] In my view, it must first be recognised that Malaysia is a federal parliamentary constitutional monarchy. Under our constitutional scheme, the rule of *constitutional supremacy* as opposed to parliamentary supremacy is upheld. This is underscored in art 4(1) of the FC where it is declared that '[t]his Constitution is the supreme law of the Federation and any law passed after I

Merdeka Day which is inconsistent with this Constitution shall to the extent of the inconsistency be void.' In this connection, I am inclined to agree with the following views of the learned Chief Justice expressed in her written judgment:

(a) that the power of constitutional review is inherent in the courts by constitutional design. The drafters of the FC had in mind certain basic principles which ought to form the bedrock of this country and that under art 159(1), Parliament may amend certain provisions of it without amending the central tenets of the FC. This is a safeguard as couched in the wide language of the first limb of art 4(1) to cast away any attempt to cause to FC to implode on itself by abuse of the legislative process;

(b) that the FC is not self-executing and that the Judiciary is the mechanism through which the supremacy of the FC is protected and upheld pursuant to art 4(1) of the FC;

(c) that the essence of the FC is the *notion of separation of powers* between the Executive, Legislature and Judicial branches of government; a concept accepted and recognised by Raja Azlan Shah FJ in *Loh Kooi Choon* at p 188. Any attempt by federal law to override or undermine this concept is inconsistent with the FC;

(d) that Parliament can define and elaborate the jurisdiction of the courts but it cannot legislate to the extent that it violates the constitutional right of judicial review contained under the second limb of art 4(1) of the FC; and

(e) that it is not *ipso facto* contrary to our FC for this court to refer to foreign doctrines or jurisprudence, where relevant.

[163] However, I am not inclined to agree with the conclusion expressed by the learned Chief Justice in her written judgment that s 4 of the POCA 1959 in particular sub-ss (1) and (2) are void for being inconsistent with the FC. I say this for the reasons that follow.

[164] The appellants' main argument is that s 4 violates the doctrine of separation of powers by requiring the magistrate (the judicial arm) to act upon the dictate of the Executive. In the context of sub-s 4(1), the appellants' contention is that once a person arrested is taken before a magistrate, the magistrate 'shall' order the remand of 21 days. According to learned counsel, the only predicate is the production, by the police of a statement in writing — setting out the matters required in the subsection. Once confronted with the statement, the magistrate is, to use the words of learned counsel, 'bound hand and foot to act as a mere rubber stamp and make the order of remand of 21 days under sub-s 4(1).

[165] The appellants' argument is predicated on the notion that the magistrate is without any discretion in the matter. In my view, whether the magistrate is with or without discretion is a matter of construction to be given to the provisions of s 4 of the POCA 1959.

[166] At the forefront of this discussion, it should be borne in mind that the POCA 1959 is an enactment sanctioned under art 149 of the FC. The purpose of art 149 is to enable Parliament, once any one or more of the six categories of action enumerated under paras (a)–(f) of Clause (1) has occurred, to make laws providing not only for its suppression but also for preventing its recurrence. Where such an Act of Parliament confers power on the Executive to act in a manner inconsistent with art 5, 9, 10 or 13, the action must be taken *bona fide* for the purpose of stopping or preventing action of the kind envisaged under the Act (see *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50 at p 54, (PC)). It goes without saying that the preventive detention of a person without trial is a serious invasion of a person's right to life and personal liberty under art 5 of the FC.

[167] Be that as it may, one of the functions of the courts is to interpret the law. An inherent part of this function is to see that the Executive acts within the law and does not encroach unnecessarily into the realm of liberty of the subject (see *Re Datuk James Wong Kim Min; Minister of Home Affairs, Malaysia & Ors v Datuk James Wong Kim Min* [1976] 2 MLJ 245 at p 251; [1976] MLRA 132 at pp 145–146 (FC)). Whatever safeguards that are provided by law against the improper exercise of such power must be vigorously enforced by the courts. As such, strict compliance with statutory requirements must be observed in depriving a person of his liberty. The material provisions of the law authorising preventive detention must be strictly construed and safeguards which the law provides for the protection of any citizen must be liberally interpreted.

[168] Where power is vested in the Executive to deprive the liberty of a person on its subjective satisfaction with reference to the specified matters, and if that satisfaction is stated to be based on a number of grounds or for a variety of reasons all taken together, and if some out of them are found to be non-existent or irrelevant, the very exercise of that power is bad. Therefore, strict compliance with the letter of the rule of law is the essence of the matter (see *Selva Vinayagam a/l Sures v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2021] 1 MLJ 601; [2021] 2 CLJ 29 (FC)).

[169] The mandatory remand period of twenty-one days under sub-s 4(1) s a clear departure from the ordinary remand procedure under s 117 of the Criminal Procedure Code ('the CPC') where: (i) the magistrate has the discretion whether to refuse or grant a remand order; and (ii) if the magistrate decides that a remand is warranted, the magistrate has the discretion to order

that a person be remanded for a period (subject to a stipulated maximum number of days) which the magistrate consider is necessary and reasonable for the purposes of investigations in relation to the matter in respect of which the person has been arrested. The length of remand under sub-s 117(2) of the CPC provides that in less serious offences, a remand of up to four days on the first application and not more than three days on the second application; and for capital and other serious offences, a remand of not more than seven days on the first application and not more than seven days on the second application.

[170] The appellant's argument is that the making of a remand order under sub-s 4(1) is mandatory and therefore subjugates the magistrate's judicial power. The appellant's argument presupposes that the magistrate has no discretion but to grant the remand order once the sub-s 4(1) written statement is produced at the remand hearing. Even though sub-s 4(1) appear to be couched in mandatory language, a careful reading of this subsection belies the appellant's argument.

[171] Subsection 4(1) which reads '[w]here any person is taken before a magistrate under subsection 3(2) the magistrate shall —' is predicated on a person arrested under sub-s 3(1) being taken before a magistrate for the purpose of an application for a remand order. This is indicative of a two-tier process under which a person must have been arrested under sub-s 3(1) prior to that person being produced before a magistrate for a remand application. It follows that the sub-s 4(1) remand application is not applicable in the case of any person arrested under any other enactment (eg, the CPC).

[172] Accordingly, before proceeding to consider the remand application under sub-s 4(1), it is incumbent upon the magistrate to satisfy himself that the person produced before him is indeed a person arrested under sub-s 3(1).

Distinction between purpose and grounds of arrest and detention

[173] The foregoing is significant because a police officer may only arrest a person under sub-s 3(1) 'if he has reason to believe that grounds exist which would justify the holding of an inquiry into the case of that person under this Act'. This phrase underscores the purpose for the arrest. The purpose for effecting an arrest under sub-s 3(1) is a distinct and separate matter from the grounds for holding that belief. The word 'grounds' in this phrase refers to facts on which the particular purpose of the arrest is based (see *Karam Singh v Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs), Malaysia* [1969] 2 MLJ 129 (FC); minority judgment of Abdul Malek Ahmad JCS (as he then was) in *Gurcharan Singh a/l Bachittar Singh @ Guru v Penguasa Tempat Tahanan Perlindungan Kamunting, Taiping & Ors* [2000] 2 MLJ 1 at pp 19–27; [2000] 1 CLJ 625 at pp 648–656 (CA); *Badrul Zaman PS Md Zakariah v*

Superintendent, Preventive Detention Centre, Kamunting & Ors [2011] 4 CLJ 873).

[174] In like vein, the purpose underlying the application for a remand order under sub-s 4(1) is — 'that there are *grounds* for believing that the name of the person should be entered on the Register'. The word 'grounds' in this phrase also refers to the facts on which the particular purpose for the remand is premised.

[175] Subsection 4(1)(a) provides for the production of a written statement by the police stating that there are grounds for believing that the name of the person arrested should be entered on the Register. However, the making of an order for remand is not automatic merely upon a written statement being produced. On a plain reading of this provision, it is clear that there are prerequisites or elements to be fulfilled before the making of the remand orders sought. In my considered view, the elements of sub-s 4(1) are objective. Consequently, the magistrate is entitled to review the sufficiency and reasonableness of the police officer's grounds for believing that the appellant's name should be entered on the Register.

[176] In conducting the review, the magistrate is not interested in detailed information. However, it is incumbent on the respondent to provide some amount of facts and particulars in order to satisfy the magistrate that there is some basis for the arrest under sub-s 3(1) and remand under sub-s 4(1). This is important because the discretion of the police to arrest and to detain pursuant to a remand order is not absolute. Put another way, the decision of a police officer, namely, whether he has the prerequisite 'grounds for believing' under an application for remand, is objectively justiciable.

[177] The burden is on the respondents to satisfy the magistrate that the preconditions constituting sub-s 4(1) of the POCA 1959 — which set out the jurisdictional threshold requisite to the exercise of the power of remand — have been met. Accordingly, the magistrate is duty bound to exercise his discretion judicially in order to ensure that all the legal, procedural and constitutional safeguards are strictly complied with before making the remand order.

[178] For the foregoing reasons, I agree with the views expressed by the learned Chief Justice that *Jaideep* is not authority for the proposition that the magistrate does not exercise judicial power under s 4 of the POCA 1959 as the issue of the constitutional validity of s 4 was not raised in *Jaideep*.

[179] Whilst on this subject, I think that it is important to reiterate that the discretionary powers of the police to arrest and detain are not absolute. In the light of the duty of a magistrate to exercise his discretion judicially in order to

ensure strict compliance with legal, procedural and constitutional safeguards, magistrates are advised to closely adhere to the following guidelines when considering a remand application under sub-s 4(1) of the POCA 1959.

Precursor to remand application under sub-s 4(1) of the POCA 1959

[180] The production of the person before a magistrate for remand under sub-s 4(1) is preceded by the arrest of the person under sub-s 3(1). The police officer's decision to arrest a person without warrant under sub-s 3(1), namely, that he has 'reason to believe that grounds exist which would justify the holding of an inquiry into the case of that person' under the POCA 1959 is objectively justiciable. The police has the burden of satisfying the magistrate that the preconditions constituting sub-s 3(1), s 28A of the CPC and art 5(3) of the FC which set out the jurisdictional threshold requisite to the exercise of the power of arrest have been complied with.

MATTERS TO BE CONSIDERED IN AN APPLICATION FOR REMAND UNDER SUB-S 4(1) OF THE POCA 1959

[181] The magistrate must be satisfied that the arrest was carried out in accordance with law — see art 5(3) of the FC and s 28A of the CPC. This is done by questioning the person arrested and perusing the police diary:

(a) that the person was produced before the magistrate within 24 hours of arrest (sub-s 3(2) of the POCA 1959);

(b) that the person arrested was informed of the grounds of his arrest by the police officer making the arrest (art 5(3) of the FC);

(c) that before commencing any questioning or recording of any statement, the police officer has informed the person of his right:

(i) to communicate with a relative or friend to inform of his whereabouts; and

(ii) to communicate and consult and be defended by a legal practitioner of his choice (s 28A of the CPC);

(d) that the police diary discloses sufficient facts and particulars to support the arresting officer's belief that 'grounds exist which would justify the holding of an inquiry into the case of the person arrested' under sub-s 3(1) of the POCA 1959. The grounds should also corroborate the belief that the person is a member of any of the registrable categories under Part I of the First Schedule POCA; and

(e) the registrable category in question should be clearly stated in the police diary.

[182] If the magistrate is not satisfied that the arrest was carried out in accordance with law, the magistrate should reject the application for remand and direct the person's immediate release.

[183] If the arrest was carried out in accordance with law, the magistrate should then proceed to satisfy himself that the sub-s 4(1) written statement contains sufficient facts and particulars to substantiate the grounds for believing that the name of the person should be entered on the Register. The relevant matters to be considered include the following:

(a) whether there are sufficient facts and particulars to show in what manner the person arrested has acted or is about to act in relation to the matter for which he has been arrested;

(b) whether there are sufficient facts and particulars to show in what manner the person arrested is a member of a substantial body of persons* to cause, or to cause a substantial body of citizens to fear, organised violence against persons or property;

*(eg, a cartel, syndicate, association, gang, triad, or group)

(c) whether the written statement has identified which particular registrable category in Part I of the First Schedule the person should be registered under;

(d) whether the action or threatened action falls within that particular registrable category;

(e) whether the registrable category identified in the written statement is the same as that stated in the arresting officer's police diary under sub-s 3(1); and

(f) whether the written statement discloses any reasonable grounds to support the belief that the name of the person arrested should be entered on the Register.

[184] If any of the necessary ingredients are not satisfied, the magistrate should direct that the person be released forthwith. If, however, all the necessary ingredients have been satisfied, the magistrate shall make an order for the remand of the person under sub-s 4(1)(a) of the POCA 1959. The magistrate should also record the reasons for his decision in a concise and comprehensive manner.

[185] For the foregoing reasons, the question of s 4 of the POCA 1959 requiring the magistrate to act on the dictate of the Executive thereby violating the doctrine of separation of powers does not arise. Accordingly, the appellants' argument that s 4 is not unconstitutional is without merit.

[186] At the hearing of these appeals, I wanted to ascertain whether the magistrate had adhered to the guidelines at the hearing of the remand applications. I requested senior federal counsel ('SFC') on behalf of the respondents and counsel for the appellants to ascertain whether the magistrate in this case had adhered to the guidelines adumbrated above before making the remand orders. Upon checking the appeal record, both SFC and counsel for the appellants confirmed that there was nothing in the appeal record to indicate that the magistrate had adhered to the guidelines to ensure strict compliance with legal, procedural and constitutional safeguards. In the light of this fact, I am constrained to hold that the remand orders made against the appellants were not made in compliance with the provisions of sub-s 4(1) of the POCA. As such, the remand orders under sub-s 4(1) are bad in law, null and void. On this ground alone I would allow the three appeals and issue the writ of habeas corpus in respect of all three appellants.

THIRD ISSUE — WHETHER THE INSERTION OF PARA 5 OF THE FIRST SCHEDULE TO POCA 1959 IS INVALID?

[187] The appellants' argument is that the Minister abused the power entrusted to him by s 22 of the POCA 1959 by including the Common Gaming Houses Act 1953 ('the CGHA 1953') as para 5 of the First Schedule is based on two grounds — (i) the Minister's power is parametered by art 149 as well as the recitals to the POCA 1959, and (ii) gaming by itself does no come within art 149(1)(a) of the FC.

[188] On this issue, I am in accord with the reasons proffered by my learned sister Hasnah Mohammed Hashim FCJ in her written judgment. Paragraph 5 of the First Schedule to POCA 1959 relates to unlawful gambling. In contrast, the CGHA 1953 is an enactment dealing with the suppression of unlicensed common gaming houses, public gaming, and public lotteries. As such, the appellants' argument is misconceived in fact and in law. I would answer this question in the negative.

FOURTH ISSUE — WHETHER THE REMAND OF THE APPELLANTS IS INFECTED WITH MALA FIDES?

[189] On this issue, I am also in agreement with the reasons proffered by my learned sister Hasnah Mohammed Hashim FCJ in her written judgment. The question is answered in the negative.

FIFTH ISSUE — WHETHER THE ALLEGATIONS MADE AGAINST THE APPELLANTS DO NOT COME WITHIN THE SCOPE OF THE POCA 1959 BECAUSE IT IS NOT A CRIME OF 'ORGANISED VIOLENCE'?

[190] In essence, the appellants' argument is that the allegations of the appellants' involvement with online gambling is not a matter that falls within the description of the crime of 'organised violence' which is a postulate to warrant the exercise of the detaining power.

[191] The argument is predicated on the words 'organised violence' which appears in the long title to the POCA 1959. According to learned counsel, the crime of online gambling has no nexus to the object or purpose of the POCA 1959 as expressed in its long title. Gambling, including illegal gaming is not of a pervading character that disturbs the general peace, tranquility and order of society and therefore does not affect public order, a fortiori it cannot come within the phrase 'organised violence against persons or property' which governs the spirit and intendment of the POCA 1959. As such, it was argued that the detention is based on grounds that are alien to the object and purpose of the POCA 1959.

[192] For context, it is necessary to read para 5 of the First Schedule which refers to — 'All persons concerned in the organization and promotion of unlawful gaming'. The word 'gaming' '... which is substantially the same in meaning as 'gambling,' has been defined to be a contract between two or more persons by which they agree to play by certain rules at cards, dice, or other contrivance and that one shall be the loser and the other the winner (*Words, Phrases & Maxims — Legally & Judicially Defined*, Anandan Krishnan, LexisNexis at para [G0023]).

[193] At the heart of this argument is the question of whether the crime of online gaming can be said to be 'organised violence against persons or property'. In this connection, it is important to appreciate the legislative history of the POCA 1959 and the related provisions. POCA 1959 was first enacted as an Ordinance (FM Ordinance No 13 of 1959) in 1959. At the tabling of the Prevention of Crime Bill on 19 February 1959, the Minister of Interior and Justice made reference to the purpose of the Bill being designed to deal with '... secret society members, gangsters, thugs, extortioners, opium dealers, pimps and keepers of brothels and gambling dens', and the need '... to protect society and prevent criminal associations developing into a dangerous menace...'. In 2014, POCA 1959 was made a law pursuant to art 149 of the FC through the insertion of the long title which reads:

> Whereas action has been taken and further action is threatened by a substantial body of persons both inside and outside Malaysia to cause, or to cause a substantial

A number of citizens to fear, *organised violence against persons or property*;

And Whereas Parliament considers it necessary to stop such action; Now, Therefore, pursuant to Article 149 of the Federal Constitution It Is Enacted by the parliament of Malaysia as follows: (Emphasis added.)

B

[194] Equally pertinent is the fact that the original POCA Ordinance provided for unlawful gaming as a registrable category on the following terms:

5 All persons *habitually* concerned in the organisation and promotion of unlawful gaming. (Emphasis added.)

C

Paragraph 5 was amended by deleting the word 'habitually' pursuant to the Prevention of Crime (Amendment of First and Second Schedule) Order 2014 [PU(A) 122/2014] to read as follows:

D 5. All persons concerned in the organisation and promotion of unlawful gaming.

[195] So, to return to the central issue — whether the crime of unlawful gaming falls within the category of 'organised violence against persons or property'. The word 'organised' means 'arranged or planned well in the way mentioned'. As an adjective, it is 'involving large numbers of people who work together to do something in a way that has been carefully planned' (*Oxford Learner Dictionaries*).

E

F **[196]** The word 'violence' literally means 'behaviour involving physical force that is intended to hurt, damage, or kill somebody or something'; physical or emotional force and energy; to damage something or have a bad effect on it (*Oxford Learner's Dictionaries*). 'Violence' has also been defined as consistent of a pattern of coercive behaviours used by a competent adult to establish and maintain power and control over about competent adult taking the form of physical and psychological damage to the person (N [c326]ndash;zbaci and Z Erkan: Metaphors for Violence, *Coll. Antropol.* 39(2015) 1: 193–201). In this light, it can be appreciated that there are two aspects to violence — physical and non-physical.

G

H

[197] In the context of the POCA 1959, the phrase 'organised violence against persons or property' must be juxtaposed with the meaning of the word 'unlawful gaming'. The words 'unlawful gaming' is not defined in the POCA 1959. It may, however, be instructive to consider Sir William Blackstone's reflections on the policy perspectives and practices of his class on gaming:

I

Luxury naturally [leads to] ... gaming, which is generally introduced to supply or retrieve the expenses occasioned by the former: it being a kind of tacit confession that the company engaged therein do, in general, exceed the bounds of their respective fortunes; and therefore, they cast lots to determine upon whom the ruin

> shall at present fall, that the rest may be saved a little longer. But, taken in any light, it is an offence of the most alarming nature; tending by necessary consequences to promote public idleness, theft, and debauchery among those of a lower class: and, among persons of a superior rank, it hath frequently been attended with the sudden ruin and desolation of ancient and opulent families, an abandoned prostitution of every principle of honour and virtue, and too often hath ended in self-murder' (*GR Blakey, (1985). Gaming, Lotteries, and Wagering: The Pre-Revolutionary Roots of the Law of Gambling*, Rutgers LJ 16(2), 211).

[198] In the old days, gambling 'farms' existed in Malaya from the beginning of British colonial rule; but as their inherent evil was soon realised, they were underground after the authorities banned their activities. Gambling farms resurfaced in 1943 after they were temporarily licensed by the Japanese during the Japanese Occupation. However, with the return of the British in 1945, gambling farms went underground again. As gambling continues to operate outside the law, Chinese secret societies got into the act by giving 'protection' to the gambling syndicates from the law (*The Triads Chinese Secret Societies in 1950s Malaya & Singapore*: Comber L (2009), Talisman Publishing Pte Ltd & Singapore Heritage Society, pp 49–52).

[199] According to Jay Albanese in his book *Organized Crime in America* (1985) Anderson Publishing Co, gambling (a type of gaming; gambling and gaming are sometimes used interchangeably) is within the category of 'the provision of illicit services' which forms part of the characteristics of organized crime. Gaming has also been characterised as a category of vice crimes related to organised groups apart from prostitution, narcotics trafficking, obscenity and pornography (Denny F Pace & Jimmie C Styles (1983), *Organized Crime: Concepts and Control*, 2nd Ed, Prentice-Hall Inc).

[200] The co-authors of a paper entitled Ferentzy, Peter & Turner, Nigel (2009) *Gambling and Organized Crime — A Review of the Literature* Journal of Gambling Issues 23, 111–155 at p 119, opined that:

> As mentioned, organized crimes as we have come to understand it emerged with the advent of modern communication and travel technologies. Yet there has been some continuity and, whether organized or 'disorganized,' and whether or not gambling served as the main source of income, *the criminal underworld has been dominated by gambles since well before the 20th century … The predominant correlation between gambling and crime is also the most obvious* … (Emphasis added.)

The paper also reported the findings of another researcher that gambling is a key component of many criminal organisations at p 126:

> *Illegal gambling, while appearing to be a minor part of a Traditional Organized Crime (TOC) network, is actually a foundation upon which most other illicit activities are supported*. Illegal bookmaking, card dens and video gambling machines are

A Traditional Organized Crime's main source of revenue. Illegal gambling and related crimes such as loansharking, money laundering and corruption provide working capital to invest in more legitimate enterprises, thereby strengthening their entire illicit operation. (Emphasis added.)

B The Straits Times (Singapore) dated 21 October 2020 also reported that illegal operators of illegal gaming '… are often connected to the underworld or triads.' and that because there are 'several layers of middlemen and runners, it would be difficult for the enforcement authorities to track or identify the read masterminds'.

C

[201] That illegal gaming is pernicious, debilitating and deleterious to the socioeconomic and heath of persons and families which also directly impacts society as a whole is also noted as follows:

D In view of the potential benefits of legalized gambling, there are also detrimental impacts of both legal and illegal gambling. Health expenditures include and are not limited to psychological treatment costs for gambling disorder, medical prescriptions for gamblers and family members, family therapy, and emergency treatment for suicidal attempts stemming from inability to cope with heavy E gambling debts. There are also associations found between problem gambling and chronic physical conditions. Problem gamblers often exhibit high levels of comorbid mental health disorders and engage in substance abuse. All these would contribute to healthcare costs at individual and societal levels. Other financial costs to the gambler and family members include debts arising from problem gambling, F personal bankruptcies, disruption or loss of employment, reduced household savings, poverty, and reduced household spending on other essential goods and services. Reduced spending by household on non- gambling related goods and services would affect other sectors of the economy such as other leisure and entertainment services. Another potential economic cost would be reduced productivity at work if the employee is distracted by gambling-related activities G which will in turn affect the organization's productivity (Loo, JMY, Phua, KL (2016) *Gambling participation and policies in Malaysia. Asian J of Gambling Issues and Public Health* 6, 3; see also GR Blakey, (1985). *Gaming, Lotteries, and Wagering: The Pre-Revolutionary Roots of the Law of Gambling*, Rutgers LJ 16(2), 211).

H **[202]** In the light of the above observations, it cannot be gainsaid that the association of illegal gaming activities with organised violence is irrefutable. On this issue, I am also in agreement with the views expressed by my learned sister Hasnah Mohammed Hashim FCJ in her written judgment.

I CONCLUSION

[203] For the foregoing reasons, I am of the view that: (i) s 4 of the POCA 1959 is not unconstitutional; (ii) the appellants' argument that the Minister abused the power entrusted to him under s 22 of the POCA 1959 by including

the CGHA 1953 as para 5 of the First Schedule is without merit; (iii) the appellants' allegation that the remand is infected with mala fides has not been made out; and (iv) online gaming is a matter that falls within the description of the crime of 'organised violence'.

[204] However, as stated above, I am of the view that the appeals should be allowed in terms of para 7 of the notice of motion and that writs of habeas corpus be issued on this ground and this ground alone — that the making of a remand order under sub-s 4(1) of the POCA 1959 is not a mechanical exercise. The magistrate is required to exercise her judicial mind to ensure that there is strict compliance with legal, procedural and constitutional safeguards before making such order. In this instance, there is nothing in the appeal record to indicate that the magistrate had satisfied herself that that all legal, procedural and constitutional safeguards have been complied with before making the remand orders against the appellants. Accordingly, the remand orders are bad in law, null and void. The appeals are allowed and the orders of the High Court are set aside.

Zaleha Yusof FCJ:

[205] I have read the separate written judgments in draft of the Right Honourable Chief Justice Tengku Maimun Tuan Mat, my learned sister Hasnah Mohammed Hashim FCJ and my learned brother Vernon Ong FCJ.

[206] On the preliminary objection raised by the respondent, just like my learned brother Vernon Ong FCJ, I totally concur with what has been expressed by the learned CJ in paras 21–56 of Her Ladyship's written judgement. In line with that, the preliminary objection raised by the respondent is hereby overruled.

[207] However, on the other issues, I could not agree more with my learned sister Hasnah Mohammed Hashim FCJ and my learned brother Vernon Ong FCJ.

[208] At the same time I would like to say the following. Although I do not deny that we can definitely refer to foreign doctrine or jurisprudence when relevant; those foreign doctrines or jurisprudence are not binding upon us and we need to be cautious in applying them into our very own law, so as not to contradict with the express provision of our law especially our written Constitution. The peculiar circumstances of the country from which the law or its doctrine were to be adopted must also be one of the considerations; for as a law is always enacted to cater for the local needs of each country.

[209] I was part of the majority in *Letitia Bosman v Public Prosecutor and*

other appeals (No 1) [2020] 5 MLJ 277; [2020] 8 CLJ 147. In that case, amongst issues raised by the appellants was that the mandatory sentencing provision under s 39B of the Dangerous Drugs Act 1952 and s 302 of the Penal Code amounted to an interference of judicial power enshrined in art 121 of the Federal Constitution, hence violated the doctrine of separation of power. The Right Honourable Chief Judge of Malaya Azahar bin Mohamed who wrote the grounds of judgment for the majority had elucidated explicitly the doctrine of separation of power and stated, inter alia, 'Unlike the facts in *Semenyih Jaya*, the exercising of judicial power by virtue of the impugned provisions is still with the court and no other alien body'. Further His Lordship said, 'Turning to the impugned provisions in the present appeals, it cannot be denied that the provisions are one of general application, prescribing a fixed punishment for the offence of drugs trafficking and murder, the sections do not have the effect of prescribing the punishment to be imposed on particular individuals or directing the outcome of particular proceedings. Neither do they purport to confer the discretion as to the measure of punishment in any particular case to an executive or other body not constituted in accordance with Part IX of the Federal Constitution'. See paras 61 and 65 of the case.

[210] In *Letitia Bosman*, the majority of 8–1 decided that by prescribing a mandatory death penalty, Parliament did not encroach into the power of the court as it is within the Parliament's power to do so and the court is expected to give effect to law duly passed by Parliament. This court in that case found the impugned provisions are not inconsistent with art 121 of the Federal Constitution.

[211] I do not see any reason to depart from that decision. The power to issue remand under s 4 of the Prevention of Crime Act 1959 ('the POCA') is still with the court and no other body. Learned counsel for the appellant submitted that the said s 4 of the POCA is violative of art 121 of the Federal Constitution (as it stood before its amendment on 10 June 1988) read with cl (1) of art 4 of the Federal Constitution. With due respect to learned counsel, how could one read into the present law a provision which is no more in existence? One can only read the provision as amended. See s 35 of the Interpretation Acts 1948 and 1967 (Act 388) which provides, inter alia, as follows:

> 35(1) A reference to a particular written law
>
> (a) is a reference to that law *as amended* or extended from time to time; and
>
> (b) Includes a reference to any subsidiary legislation made thereunder. (Emphasis added.)

'Written law' is defined in s 3 of Act 388 as, inter alia, the Federal Constitution. Hence, art 121 must be read as it is now, after the amendment. Unless and until

it is further amended, and unless and until it is challenged under art 128 of the Federal Constitution, it remains valid as it is.

[212] Accordingly, with those reasons coupled with the reasons found in the written judgment of my learned sister Hasnah Mohammed Hashim FCJ and my learned brother Vernon Ong FCJ; I concur that POCA especially its s 4 does not violate art 121 of the Federal Constitution and therefore is valid and constitutional. However as explained by my learned brother Vernon Ong FCJ, under s 4 the magistrate is duty bound to exercise his discretion judicially in order to ensure that all the legal procedural and constitutional safeguards are strictly complied with before making the remand order. Having perused the appeal records, I find such exercise is lacking. Only on this ground, I accordingly allow these three appeals, in terms of prayer 7 of their notice of motion. The order of the High Court is now set aside and the application for a writ of habeas corpus is allowed.

Hasnah Hashim FCJ:

INTRODUCTION

[213] The central issue in these appeals is the constitutionality of s 4 of the Prevention of Crime Act 1959 ('the POCA'). The Federal Constitution ('the FC') is the heartbeat of this great Nation defining the Legislature, Executive, and Judiciary parameters, intricately woven yet profoundly independent of each other. The sanctity of the FC must be respected, jealously protected, staunchly defended, and guarded at all times.

THE APPEALS

[214] The appeals emanated from the decision of the learned judicial commissioner (JC) made on 2 November 2020. The learned JC dismissed the appellants' applications for a writ of habeas corpus as he was satisfied that the detention orders issued by the magistrate against the appellants were lawfully made. Aggrieved by the decision of the High Court the appellants filed their respective appeals.

[215] We heard the oral submissions of the respective counsel for the parties on 28 December 2020. As we needed time to consider the submissions of the parties we had indicated to the parties that we will inform them of our decision once we are ready to do so. This is the decision of the majority and the reasons for having so decided.

A THE FACTS

[216] The appeals concern the arrest and detention of three individuals (collectively referred to as 'the appellants'). Zaidi bin Kanapiah, the appellant in Appeal No 05(HC)-153–1 of 2020(W) is a businessman. Mohd Hairy bin Mohammad the appellant in Appeal No 05(HC)-155–11 of 2020(W) and Muhamad Amin Nur Rashid bin Mohamed Puad, the appellant in Appeal No 05(HC)-156–11 of 2020(W) are police officers. The appellants were arrested pursuant to sub-s 3(1) of the POCA on 13 October 2020.

[217] The appellants were detained under sub-s 4(1) of the POCA for an initial period of *21 days* from *14 October 2020–3 November 2020*. On *30 October 2020*, the police obtained a further remand order under sub-s 4(2) of the POCA for a further *38 days detention until 6 December 2020*.

[218] Pursuant to an order issued under sub-s 19A(1) of the POCA the appellants were further remanded for *a period of two years from 25 November 2020*. The appellant, Zaidi bin Kanapiah is detained in Pusat Pemulihan Khas ('PPK') Pokok Sena Kedah, Mohd Hairy bin Mohammad is detained in PPK Bentong, Pahang and Muhamad Amin Nur Rashid bin Mohamed Puad is detained in PPK Simpang Renggam, Kluang, Johor.

THE HIGH COURT

[219] The appellants filed in the High Court applications for a writ of habeas corpus *ad subjiciendum et recipiendum.* At the High Court it was argued by learned appellants' counsels that the detention violated the rights of the appellants and that the applications for habeas corpus should be allowed for the following reasons:

(a) the detention by the police was made in bad faith or mala fide, as the appellants are material witnesses in an on-going investigations conducted by the Malaysian Anti-Corruption Commission ('MACC'). The appellants have been made scapegoats as they are material witnesses in relation to investigations being conducted by MACC with regards to alleged corrupt practice amongst members of the Royal Malaysian Police Force (PDRM) in online gambling activities known as the Macau Scam;

(b) the detention is procedurally improper and/or in breach of the appellants' constitutional right to be informed of their grounds of arrest as provided under cl (5) of art 5 of the FC as the applicants were never notified of their grounds of arrest; and

(c) the detention is illegal and/or irrational as the respondents failed to show that any grounds exist justifying the holding of an inquiry into the

appellants under sub-s 3(1) of the POCA.

[220] The learned JC found that the appellants failed to prove any evidence of mala fide as it was only their allegation that they have been detained by the police to shut them up from revealing information to the MACC. He reached the conclusion that the appellants are suspects in the MACC's investigations and not witnesses as claimed. He explained in his written judgment:

> [16] This argument is clearly flawed because the Applicants were detained first by the MACC before they were detained under the Prevention of Crime Act 1959. The Applicants could have easily 'spilled the beans' so to speak, or 'come clean' to the MACC while under their custody before the police detained them. Apart from that, looking at the additional affidavit in support by Roy Azman bin Suhut which is in encl 14 in Case No 44–207–10 of 2020, it is abundantly clear that the applicants are suspects in the MACC's investigations and not witnesses as claimed by the applicants. See exh B attached to the said affidavit. It clearly states that the applicant Zaidi Kanapiah was arrested under s 4(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001.

[221] After considering the oral and written submissions of learned counsels, the learned JC concluded that all the requirements under s 4 of the POCA had been complied. On the illegality of the detention order, since there were no grounds to justify the holding of an inquiry under POCA, the learned JC held that the respondents had given their reasons in the affidavits for the detentions, that the appellants are suspected to be persons concerned in the organisation and promotion of unlawful gaming:

> [18] Finally, on the issue that the detentions are illegal as no grounds shown which would justify the holding of an inquiry under the Act, the respondents have stated that the reason for the detentions is that the applicants are suspected to be persons concerned in the organization and promotion of unlawful gaming as per the First Schedule of the Act. The inquiry officer has yet to hold an inquiry under s 9 and prepare his report as provided for under s 10 of the Act. As I stated in *Lan Limiao & Ors v Inspector Mohammad Hafifi bin Zailan & Ors* [2020] MLJU 130:
>
> > Secondly the applicants have only been detained at the initial remand stage. The inquiry under s 9 of the POCA has yet to be held and the Board has not convened to consider the report of the inquiry officer. In other words it is premature to say that the applicants are not involved in the organisation and promotion of unlawful gaming.

THE ARGUMENTS

[222] Learned counsel for the appellants advanced the following arguments in support of their appeals that the detention of the appellants is illegal:

(a) s 4 of the POCA is unconstitutional as it violates the doctrine of

separation of powers by requiring the judicial arm to act upon the dictate of the Executive;

(b) cl (2) of art 5 is a fundamental right that POCA has not excluded and it is not open to the High Court to entertain preliminary objections or objections based on technicalities as this will be contrary to the mandatory provisions of cl (2) of art 5;

(c) the detention of the appellants in this case is mala fide because the police officers making the arrest and recommending the detention were subject of an inquiry by MACC into their corrupt activities. The appellants are material witnesses in that inquiry;

(d) the Minister abused the power entrusted to him by s 22 of the POCA by including the Common Gaming Houses Act 1953 ('the CGHA') as Item 5 of the First Schedule. The Minister's power is provided by art 149 of the FC as well as the recitals to the POCA. Gaming by itself does not come within cl (1)(a) of art 149 FC; and

(e) the allegations made against the appellants do not come within the scope of the POCA because it is not a crime of 'organised violence'.

[223] In respect of the constitutionality of s 4 of the POCA, learned counsel for the appellant, the distinguished Datuk Seri Gopal Sri Ram argued that the police and the public prosecutor are part of the Executive, whilst the magistrate is part of the Judiciary. Section 4 of the POCA requires the magistrate to act upon the dictate of the Executive. Under s 4 of the POCA the magistrate has no discretion at all and acts as a mere rubber stamp. By taking away the discretionary powers of the magistrate s 4 of the POCA violates art 121 of the FC as it stood before the said article was amended on 10 June 1988 vide Act A704 read with cl (1) of art 4(1) of the FC.

[224] Learned counsel for the appellants contended that the amendment to art 121 of the FC (Act A704) is a nullity because of the deletion of the words 'the judicial power of the Federation shall be vested in two High Courts' effectually reduces the Judiciary from being a separate and independent organ to be a mere subordinate or subjugate of Parliament. In essence, eroding the powers of the Judiciary. The absence of judicial discretion violates the separation of power, which forms the basic structure of the Constitution.

[225] Learned counsel urged this court to read art 121 of the FC as it stood in 1988 before it was amended. Act A704, the Act amending art 121, in pith and substance removed the Judiciary as an equal arm of the government. The jurisdiction of the Judiciary cannot be truncated or infringed even if expressly provided by written law. This is against the doctrine of separation of powers which is part of the basic structure of the Constitution. In support he relied on

the basic structure doctrine as propounded by the Indian Court in *Kesavananda Bharati v State of Kerala & Anor* AIR 1973 SC 1461; (1973) 4 SCC 225.

[226] It is submitted by learned counsel that the amended cl (1) of art 121 of the FC is against the doctrine of separation of powers which is part of the basic structure of the FC. The case of *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 is bad law and cannot be relied on as authority. In support learned counsel for the appellants relied on *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561; [2017] 5 CLJ 526 and *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545; [2018] 3 CLJ 145.

[227] Learned counsel for the appellants further submits that cl (2) of art 5 of the FC is a fundamental right not excluded by POCA and therefore not open to the High Court to entertain any preliminary objection based on technicalities as it will be contrary to the provisions of cl (2) art 5 of the FC. In an habeas corpus application, the critical question to be determined is whether the detention is lawful. In support of this argument learned counsel cited *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & Other Appeals* [2002] 4 MLJ 449; [2002] 4 CLJ 309 and argued that cases which have decided in conflict with *Ezam* were all wrongly decided. habeas corpus application is not academic merely because of the wrong order of detention cited or because of supervening events, or even if the detainees have been released on bail.

[228] The detentions, in this case, are marred with mala fides because the police officers who made the arrest were themselves subject to inquiry by MACC. The detenus were material witnesses in the inquiry, and the detention of the appellants sought to frustrate the investigation being conducted by MACC.

[229] The Minister had abused the power given under s 22 of the POCA by including the CGHA as Item 5 of the First Schedule. The Minister's power is as provided by art 149 of the FC as well as the recitals to the POCA. And that it is evident that gaming does not fall within the ambit of art 149 of the FC. The allegations made against the detenus do not come within the scope of the POCA because it is not a crime of 'organised violence'. The court must look at the lawfulness and unlawfulness of the detention.

[230] Relying on his written submission, the thrust of the argument of learned senior federal counsel (SFC) submitting for the respondent is as follows. The appeal is academic as the basis of the application no longer exists.

A The learned SFC argued that the application for a writ of Habeas Corpus should be directed only to the current detention order and in support, cited the case of *Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri Malaysia & Ors* [2006] 1 MLJ 309; [2005] 4 CLJ 613. The subject matter of the appeal, which is the remand order granted by the magistrate on 14 October 2020 B allowing the application of the respondent to remand the appellants for a period of 21 days from 14 October 2020–3 November 2020, has lapsed by virtue of the further remand order that was granted upon the application of the respondents on 30 October 2020. The 21 days remand order made pursuant to *para 4(1)(a)* of the POCA had *expired on 30 October 2020* and replaced by the C 38 days remand order under *para 4(2)(a) POCA*.

[231] To buttress his submissions, the learned SFC have placed reliance upon the case of *Keng Kien Hock v Timbalan Menteri Keselamatan Dalam Negeri Malaysia and other appeals* [2007] 5 MLJ 611; [2007] 5 CLJ 171 where the D Court of Appeal held that failure to challenge or dispute specific averments would amount to a concession and the case of *Karpal Singh a/l Ram Singh lwn Menteri Hal Ehwal Dalam Negeri, Malaysia dan satu lagi* [2002] 1 MLJ 138; [2002] 1 CLJ 133, where the High Court held that it is trite law that E parties are bound by the pleadings.

[232] The learned SFC further submitted that despite the respondents' preliminary objection, the High Court proceeded to hear the substantive issues in the application as the appellants had not challenged the 21 days remand F order.

[233] The learned SFC argued that the judicial power of a magistrate under preventive law and under punitive law are two different aspects of the jurisdiction. Under the prevention law such as POCA, a magistrate under G para 4(1)(a) of the POCA exercises the power of a detaining authority under the Act. Thus, the argument of the appellants' counsel that the judicial power under s 4 of the Act is limited is misguided from the intention of Parliament to enact POCA in such a manner.

H **[234]** Learned SFC further submitted that the magistrate under POCA serves as a 'check and balance' as stated in *Hansard* when the Prevention of Crime Bill 1959 was read a second time in the House of Representatives on 19 February 1959. The powers of a magistrate under s 4 of the POCA does not affect the judicial power of the court as suggested by counsels for the appellants, but is, in I fact, an additional power given to the Judiciary to review and balance the power of the Executive in implementing as well as enforcing the Act.

[235] The recent Federal Court's decision in *Letitia Bosman v Public Prosecutor and other appeals (No 1)* [2020] 5 MLJ 277; [2020] 8 CLJ 147 was

referred by the learned SFC in support of his argument that Parliament does not transgress into the power of the court. The Federal Constitution may be amended in accordance with art 159 of the FC, subject to the conditions and processes prescribed by the FC. The learned SFC also argued that the amendment to the Federal Constitution through Act A704 is valid as it had been enacted in accordance with art 159 of the FC.

[236] The SFC further argued that s 4 of the POCA does not violate to art 121 of the FC. The issuance of a remand orders under para 4(1)(a) of the POCA is valid and according to the law.

PRELIMINARY ISSUE

[237] It was argued before us by the learned SFC that the appeals are academic as the basis of the application no longer exists. The learned SFC argued that the application for a writ of habeas corpus should be directed only to the current detention. The subject matter of the appeals is the remand order granted by the magistrate on 14 October 2020 allowing the application of the respondent to remand the appellants for a period of 21 days from 14 October 2020–3 November 2020 lapsed by virtue of the further remand order that was granted upon the application of the respondents on 30 October 2020. The 21 days remand order made pursuant to *para 4(1)(a)* of the POCA had *expired on 30 October 2020* and replaced by the 38 days remand order under *para 4(2)(a) of the POCA*. The habeas corpus applications were fixed for hearing in the High Court on a Monday. However, the respondents obtained the 38 days order on the Friday before the hearing of the habeas corpus application. On the day of the hearing, the following Monday, the respondents objected to the applications on the grounds that it was academic. The learned JC referred to the Federal Court cases of *Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri Malaysia & Ors* [2006] 1 MLJ 309; [2005] 4 CLJ 613 and *L Rajanderan a/l R Letchumanan v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2018] Supp MLJ 393; [2010] 7 CLJ 653 where this court held that nothing which has happened before the present detention took effect will be relevant to the issue before the court.

[238] Learned counsel for the appellants in support of his arguments that the appeal is not academic cited the case of *Ezam* where this court rejected the preliminary objection that the appeal before was academic. The five distinguished members of the Panel in *Ezam* decided that the basis for the detention orders signed by the Minister under s 8 of the ISA was the outcome of the police investigations conducted on the appellants whilst they were being detained thus, the correctness of the decision of the High Court remained a live issue.

[239] The Federal Court in *Mohd Faizal*, however, took a different approach and held that the writ of habeas corpus must be directed against the current order of detention even when the earlier arrest is irregular. It follows that where a detention order has been made the writ of habeas corpus must be directed against the current detention order even if the earlier arrest and detention are irregular. Hence, any irregularity in a detention order made when it has been superseded by one under sub-s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 is not a relevant matter for consideration. A prior illegality that has ceased cannot be the subject matter of inquiry.

[240] An interesting point to note is that in *Ezam* the appellant was arrested and detained under s 73 of the Internal Security Act 1960. In *Faizal*'s case however, the appellant was detained under the sub-s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985.

[241] Despite the respondents' preliminary objection, the High Court proceeded to hear the substantive issues in the application as the appellants had not challenged the 21 days remand order. I am of the firm view that whether the appeals are academic or not, in the interest of justice, the appellants should be allowed to argue on the proprietary of the remand orders issued against them and that the appeals must be heard on the merits.

ANALYSIS AND DECISION

[242] Having set out the background to the arguments by the parties, I shall now address the principal arguments in these appeals.

[243] The principal issue in these appeals before us hovers on the constitutionality of the POCA, in particular s 4 of the said Act. This court in the case of *Rovin Joty a/l Kodeeswaran v Lembaga Pencegahan Jenayah & Ors and other appeals* [2021] 2 MLJ 822; [2021] 4 CLJ 1 decided that POCA having been legitimately birthed under art 149 of the FC is not unconstitutional:

> [95] Therefore, in approaching the present appeals, the court must be guided by the clear words of the FC and POCA, in this case arts 149, 151(3), ss 15B and s 21A of the POCA. We have discussed in the preceding paras 82–86 of this judgment, *that it is within the province of the legislature in accordance to the powers given to it under art 149 of the FC to enact the impugned provision to address the mischief of national security*. It is also within the realm of the Legislature's power to enact the impugned provisions which provides for limited judicial review.
>
> [96] In this regard we are reminded by the words of Lamin bin Mohd Yunus PCA, in *Ketua Polis Negara v Gan Bee Huat* [1998] 3 MLJ 86, where he referred to the judgment of Tun Suffian LP when His Lordship delivered the judgment of the Federal Court in *Public Prosecutor v Lau Kee Hoo* [1983] 1 MLJ 157 at p 159 on the constitutionality of the Internal Security Act 1960:

> The ISA is legislation against subversion expressly authorised by art 149 of the Constitution. Mr Karpal Singh conceded that the Act was constitutional; that being so we cannot see how it can be said that the impugned section is invalid as being contrary to art 5(1); because the article itself expressly provides that any provision of law enacted under the article is valid 'notwithstanding that it is inconsistent with art 5'. Hence, one can see the stature that is being given to legislations promulgated under art 149 in that, laws enacted under the said article is constitutional despite it being inconsistent with certain articles of the FC.

[244] Similar issues, in particular, in respect of the doctrine of basic structure and art 121 of the FC were raised and argued in *Letitia Bosman v Public Prosecutor and other appeals (No 1)* [2020] 5 MLJ 277; [2020] 8 CLJ 147, *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 1 MLJ 750; [2021] 2 CLJ 579, and more recently *Rovin Joty*, a departure from the decisions would be anathema to the judgment of the majority. Nevertheless, I will address the issues the distinguished learned counsels have raised for the appellants and the respondents.

[245] The basis of the appellants' complaints is that their rights under the FC have been unjustly violated.

THE BASIC STRUCTURE DOCTRINE

[246] This doctrine has been discussed and addressed at length in all the aforementioned cases. However, I find it necessary to address this doctrine and the reasons of the doctrine inapplicability.

The historical journey of the basic structure doctrine

[247] It is imperative at this juncture to embark on a historical journey of the birth and development of the basic structure doctrine in order to appreciate and understand the reasons the doctrine does not apply to our Federal Constitution. We begin the journey with two constitutional lawyers, Carl Schmitt (1888–1985), a German lawyer, and French jurist, Maurice Hauriou (1856–1929), whom both had developed the idea of implied constitutional limits on a constitutional amendment at the start of the 20th Century. Schmitt's theory of implied limits on the constitutional amendment was based on a concept of the constituent power but, Hauriou took a different route: the procedural approach; that the constituent power is to be exercised by a constituent assembly. Certain fundamental principles are natural law and therefore constituted a limitation on amending a constitution.

[248] Schmitt based his theory of implied limits on a constitutional amendment on the idea that the constituent power is the basis for all powers and that the constituent power is a legal entity that existed outside, alternatively alongside, a constitution. The will of this almighty constituent power is the reason for the existence and validity of a constitution and that only the constituent power itself is to decide on fundamental questions relating to the manner and form of its own political existence.

[249] The German Constitution applicable from 1919–1949 ('the Weimar Constitution') consisted of norms incorporating fundamental decisions and devoid of any material limits on constitutional amendment. Article 76 of the Weimar Constitution stipulated that the constitution can only be amended by legislation. A decision of the Reichstag (the German Parliament) regarding the amendment of the Constitution will only take effect when two-thirds present consented. If a constitutional amendment is concluded by initiative in response to a referendum, then the consent of the majority of enfranchised voters is required. If the Reichstag passes a constitutional change against the objection of the Reichsrat, the organ representing the governments, the President is not permitted to promulgate this statute if the Reichsrat demands a referendum within two weeks.

[250] Adolf Hitler completely changed the Weimar Constitution by taking away the fundamental rights of the Germans under the constitution. During his tenure as the Chancellor of Germany, Hitler declared an emergency and suspended the constitutional protections on civil rights ie the Right to Freedom of Speech and Expression, Association, Residence and Habeas Corpus. The German legislature then passed an Act empowering the executive to pass legislations, in addition to the Legislature.

[251] Post Hitler the Germans realised that mere procedural limits were insufficient safeguards against anti-constitutional forces amendment. Therefore, the Federal Republic of Germany introduced substantive limits to the amending power by expressly designating certain parts that cannot be modified by the Parliament. The German Constitution incorporated the principles of federalism, democracy, rule of law, separation of powers, basic rights of people etc art 79(3) of the Basic Law explicitly forbids any amendment whatsoever and howsoever to the provisions concerning the basic principles as laid down in German Constitution which, inter alia, included principles of federalism, democracy, rule of law, separation of powers etc. The German refers this clause as the 'Eternity Clause' (art 79 para 3) and reads:

> Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.

[252] The origin and development of the basic structure doctrine in India were apparently influenced by the German scholar, Professor Dietrich Conrad, a German scholar, described as the person responsible for the 'basic structure' doctrine which has been accepted in many jurisdiction. The blatant abuse of the Weimar Constitution by Adolf Hitler during the Nazi era arbitrarily taking away the fundamental rights of the German people, had a significant impact on Conrad which subsequently resulted in Conrad to develop the theory of implied limitations.

[253] Conrad was invited to deliver a lecture at the Banaras Hindu University in India sometime in 1965 and the topic of his lecture 'Implied Limitation of the Amending Power'. Conrad's view is that an amending body cannot change the very structure of which supports its constitutional authority that is the legislature cannot change the Constitution and its provisions which had empowered it the power of amendment. Therefore, it is Conrad's opinion that there is a need for implied limitations in every Constitution.

[254] In *Sri Sankari Prasad Singh Deo v Union of India and State of Bihar* 1951 AIR 458; 1952 SCR 89 and *Sajjan Singh v State of Rajasthan* 1965 AIR 845; 1965 SCR (1) 933 the Indian Supreme Court upheld the proposition that Parliament's power is constituent and unlimited. In *IC Golaknath & Ors v State of Punjab* 1967 AIR 1643; 1967 SCR (2) 762, the Indian Supreme Court overruled the previous decisions and took a different approach and position, that is in respect of fundamental rights, no authority could take them away:

> Fundamental Rights cannot be abridged or taken away by the amending procedure in Art 368 of the Constitution. An amendment to the Constitution is 'law' within the meaning of Art 13(2) and is therefore subject to Part III of the Constitution.

[255] The Indian basic structure doctrine was developed by a majority of 7:6 in the landmark case *Kesavananda* in 1973. In *Kesavananda* the Indian Supreme Court held that although the Parliament has the power to amend the Constitution, this power cannot destroy the basic or fundamental feature of the Constitution. It must be emphasised that the Indian Constitution was framed by the Constituent Assembly and framed by the people of India in their Constituent Assembly influenced by the Indian courts to impose implied substantive limitation over the amending power of the Constitution. Article 368 of the Indian Constitution vests in the Indian Parliament with the powers of addition, variation and repealing any provision of the Constitution. Nevertheless, this power must comply with certain procedure:

> Power of Parliament to amend the Constitution and procedure therefore
>
> (1)Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article

(2) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill: Provided that if such amendment seeks to make any change in

(a) Article 54, Article 55, Article 73, Article 162 or Article 241, or

(b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or

(c) any of the Lists in the Seventh Schedule, or

(d) the representation of States in Parliament, or

(e) the provisions of this article, the amendment shall also require to be ratified by the Legislature of not less than one half of the States by resolution to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent

(3)Nothing in Article 13 shall apply to any amendment made under this article

(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article whether before or after the commencement of Section 55 of the Constitution (Forty second Amendment) Act, 1976 shall be called in question in any court on any ground

(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article PART XXI TEMPORARY, TRANSITIONAL AND SPECIAL PROVISIONS

[256] The facts of *Kesavananda* can be summarised as follows. Kesavananda Bharati was the chief of Edneer Mutt, a religious sect in Kasaragod district of Kerala. He had certain pieces of land in the sect which were owned by him in his name. The state government of Kerala introduced the Land Reforms Amendment Act, 1969 which enabled the government to acquire some of the lands belonging to the sect. On 21 February 1970, Kesavananda Bharti moved the Indian Supreme Court under art 32 of the Indian Constitution for enforcement of his rights which is guaranteed under art 25; the Right to practice and propagate religion), art 26; the Right to manage religious affairs, art 14; the Right to equality, art 19(1)(f); the freedom to acquire property, art 31; Compulsory Acquisition of Property. When the petition was still being considered by the court, the Kerala Government passed another act that is, the Kerala Land Reforms (Amendment) Act 1971.

[257] In *Kesavananda* the 24th Constitutional Amendment was challenged before the Supreme Court of India. The amendment allowed the Indian Parliament to add, modify or repeal any part of the Constitution as long as it is passed with the requisite majority. The majority of judges namely, Sikri CJ

Hegde and Mukherjea JJ; Shelat and Grover JJ; Jaganmohan Reddy J; and Khanna J reasoned that art 368 of the Indian Constitution did not enable the Indian Parliament to alter the basic structure or framework of its Constitution.

[258] In summary, the majority of seven in *Kesavananda* recognised the power of Parliament to amend any or all provisions of the Constitution however, such an act must not destroy its basic structure. Interestingly, there was no unanimity of opinion as to the features of basic structure, with each judge expressing their views as to the features of the basic structure of the Constitution. Sikri CJ explained that the concept of basic structure included supremacy of the Constitution as well as a republican and democratic form of government. His Lordship also included as basic structure features the secular character of the Constitution, separation of powers between the Legislature, Executive and the Judiciary as well as the federal character of the Constitution. Shelat J and Grover J expressed in their respective judgment that basic structure must also include the mandate to build a welfare state contained in the Directive Principles of State Policy and unity and integrity of the nation. Hegde J and Mukherjea J identified the following as being the basic features:

(a) sovereignty of India;

(b) democratic character of the polity;

(c) unity of the country;

(d) essential features of the individual freedoms secured to the citizens; and

(e) the mandate to build a welfare state.

[259] It can thus be concluded that in *Kesavananda* the features under the basic structure doctrine are a never-ending list and may comprise of legal concepts, doctrines as well as legal expectations.

[260] The minority of six's view in *Kesavananda* upheld the validity of all the amendments challenged before the court and that the Indian Parliament can make fundamental changes in the Constitution by exercising its power under art 368.

[261] Learned counsels for the appellants argued in submission that in Malaysia, there is no necessity to resort to the theory of an implied limitation upon the power of Parliament to amend a provision of the Constitution to give effect to the basic structure doctrine as the doctrine is integrated into the FC by virtue of cl 1 of art 4 which states that 'inconsistent with this Constitution' and not 'inconsistent with any provision of this Constitution'. It is the submission of the learned counsels for the appellants that a harmonious result is obtained by interpreting cl 1 of arts 4 and 159 of the FC through either the direct consequence test or by applying the pith and substance canon of construction.

[262] The words 'this Constitution' or 'any provision of this Constitution' refer to the Federal Constitution. Article 159 of the FC gives the power to Parliament to amend the Constitution but exercisable subject to conditions as specified. Any amendment laws or Bills that fail to comply or do not comply with the prescribed conditions expressly provided under the FC the amendment is void. This is what supremacy of the FC means.

[263] In considering the constitutionality of the amendment to cl 4 of art 5 of the FC, the basic structure doctrine was addressed and rejected by the Federal Court in the case of *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187. In *Loh Kooi Choon* the plaintiff was arrested and detained under the provision of Restricted Residence Enactment 1933 but unfortunately not produced before the magistrate within the prescribed 24-hours as provided by art 5(4) of the FC. The Federal Court rejected the doctrine of implied substantive limitations and held that there were only certain procedural limitations and by following the required procedural limitation constitutional guarantees might be removed. In his illuminating judgment, the eminent Raja Azlan Shah FCJ explained the reasons for rejecting the basic structure doctrine and that if the framers of the FC intended that Part II of the FC was unamendable, they would have made it explicitly and expressly clear. I find it necessary to reproduce the relevant paragraphs of the judgment to impress that *Loh Kooi Choon*, even after four decades through the test of time remains good law and authority:

> The question whether the impugned Act is 'harsh and unjust' is a question of policy to be debated and decided by Parliament, and therefore not meet for judicial determination. To sustain it would cut very deeply into the very being of Parliament. Our courts ought not to enter this political thicket, even in such a worthwhile cause as the fundamental rights guaranteed by the Constitution, for as was said by Lord Macnaghten in *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107 118:
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> > Some people may think the policy of the Act unwise and even dangerous to the community. Some may think it at variance with principles which have long been held sacred. But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. It is, I apprehend, as unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the Legislature.
>
> It is the province of the courts to expound the law and 'the law must be taken to be as laid down by the courts, however much their decisions may be criticised by writers of such great distinction' — per Roskill LJ in *Henry v Geopresco International Ltd* [1975] 2 All ER 702 at p 718. Those who find fault with the wisdom or expediency of the impugned Act, and with vexatious interference of fundamental rights, normally must address themselves to the legislature, and not the courts; they have their remedy at the ballot box.

> The Constitution is not a mere collection of pious platitudes. It is the supreme law of the land embodying three basic concepts: One of them is that the individual has certain fundamental rights upon which not even the power of the State may encroach. The second is the distribution of sovereign power between the States and the Federation, that the 13 States shall exercise sovereign power in local matters and the nation in matters affecting the country at large. The third is that no single man or body shall exercise complete sovereign power, but that it shall be distributed among the Executive, Legislative and Judicial branches of government, compendiously expressed in modem terms that we are a government of laws, not of men.
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> ...
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> ...
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> Whatever may be said of other Constitutions, they are ultimately of little assistance to us because our Constitution now stands in its own right and it is in the end the wording of our Constitution itself that is to be interpreted and applied, and this wording 'can never be overridden by the extraneous principles of other Constitutions' — see *Adegbenro v Akintola & Anor* [1963] 3 All ER 544 at p 551. Each country frames its constitution according to its genius and for the good of its own society. We look at other Constitutions to learn from their experiences, and from a desire to see how their progress and well- being is ensured by their fundamental law.
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> ...
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> It is therefore plain that the framers of our Constitution prudently realised that future context of things and experience would need a change in the Constitution, and they, accordingly, armed Parliament with 'power of formal amendment'. They must be taken to have intended that, while the Constitution must be as solid and permanent as we can make it, there is no permanence in it. There should be a certain amount of flexibility so as to allow the country's growth. In any event, they must be taken to have intended that it can be adapted to changing conditions, and that the power of amendment is an essential means of adaptation. A Constitution has to work not only in the environment in which it was drafted but also centuries later.
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> ...
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> *This reasoning, in my view, is based on the premise that the Constitution as the supreme law, unchangeable by ordinary means, is distinct from ordinary law and as such cannot be inconsistent with itself. It is the supreme law because it settles the norms of corporate behaviour and the principle of good government.* (Emphasis added.)

[264] Wan Suleiman FCJ in the same case, observed ad idem that it is the function of Parliament to decide whether an amendment is necessary or otherwise and it is not the role of the Judiciary to question:

> Coming back to the issue before us, there is thus persuasive authority that whilst abrogation of the fundamental rights may not come within the ambit of our art 159, reasonable abridgement of such rights are constitutional; *that Parliament should*

decide when such amendment is necessary and it is not for this court to question the wisdom or need for such amendment.

I do not feel that the issue before this court would call for my view on whether there are indeed inherent or implied limitations to the power of amendment under art 159, and must perforce confine myself to the issue before us viz. is the amendment to the fundamental right set out in art 5 by Act A354/76 constitutional? Nor do I feel called upon to answer the broader issue of whether the power to amend includes the power to abrogate a fundamental right.

The power to amend would not, in this country, be restricted by anything set out in a Preamble for there is no Preamble to our Constitution. It seems to me to be clear that if there is to be any restriction to the right to amend any of the fundamental rights set out in Part II, such restriction would have been set out in one of the various clauses of art 159 itself.

[265] The doctrine of the supremacy of Parliament does not apply in Malaysia as explained succinctly by Mohammed Suffian Hashim (Lord President) in *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112; [1976] 1 LNS 3. His Lordship reiterated that the doctrine of supremacy of Parliament has no place in Malaysian jurisprudence. It is the Federal Constitution that is supreme and that Parliament and State Legislatures' powers to legislate laws are prescribed by the provisions of the FC:

The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of State legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please.

[266] His Lordship surmised in *Ah Thian* that any federal or state law may only be declared invalid on one of three grounds as provided under the FC. The Constitution of this Nation is a written constitution designed with safeguards to protect its citizen's fundamental rights and liberties. Amendments to any law or enacting any law must be within the defined framework of the provisions of the FC. In crafting the FC, the designers, in their wisdom, gave Parliament the powers to amend the Constitution subject to the strict requirements as provided under art 159 of the FC. There may be circumstances where it may be necessary to amend the Constitution. In amending the FC, the provision of art 159 of the FC must be strictly adhered to.

[267] The Federal Court comprising of Mohammed Suffian LP, Wan Suleiman and Syed Othman in *Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70 unanimously agreed with Raja Azlan Shah FCJ in *Loh Kooi Choon* and held that Parliament has the power to make constitutional amendments that are inconsistent with the Constitution. In construing cl 1 of art 4 and art 159 the rule of harmonious construction requires the court to give effect to both provisions and that Parliament may amend the Constitution in any way they think fit, provided that all the conditions precedent and subsequent regarding

manner and form prescribed by the Constitution. A

[268] In *Phang Chin Hock* Suffian, LP explained the difference between the Indian Constitution and the FC:

> In Malaya, on the other hand, the Constitution was the fruit of joint Anglo-Malayan efforts and our Parliament had no hand in its drafting. The first draft was put up by a Royal Commission headed by Lord Reid jointly appointed by the British sovereign and the Malay Rulers; it was published for public discussion and debate; an amended draft was agreed by the British Government and the Malay Rulers and also by the then Alliance Government; it was approved by the British Parliament, by the Malayan Legislative Council (the then federal legislature) and by the legislature of every Malay State. When the British finally surrendered legal and political control, Malaya had a ready-made Constitution and there was no occasion. for Malayans to get together to draw up a Constitution. B C
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> *Our Constitution has no preamble and no directive principles of state policy.* D
>
> *Indian Courts draw a distinction between the power of the Indian Parliament to amend the Constitution in its constituent capacity and to make ordinary law in its ordinary legislative capacity.*
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> *We do not think that we can draw such a distinction here as our Constitution was not drawn up by a constituent assembly and was not 'given by the people'.* (Emphasis added.) E

[269] In *Maria Chin* one of the questions posed for determination of this court was whether s 59A of the Immigration Act is valid and constitutional in the light of *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561; [2017] 5 CLJ 526 and *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545; [2018] 3 CLJ 145. It was argued by the appellants that '… these cases identified judicial review as a constitutional imperative operationalising the rule of law underpinning of the Federal Constitution and its concomitant, the separation of powers and that these two concepts taken together were declared as the 'basic structure' of the Federal Constitution, sacrosanct and inviolable and not amenable to amendment by recourse to art 159 of the Federal Constitution (see para 479 of *Maria Chin*). The parties, had in their submission argued on the application of the doctrine of basic structure. In *Maria Chin* Abdul Rahman Sebli FCJ agreed with the submission of the SFC: F G H

> [542] Given the foregoing, I agree with the learned Senior Federal Counsel that in summary, what it comes to is this: I
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> (a) ouster clauses are not per se constitutionally invalid. Properly understood, what is sought to be ousted is the availability of remedy for enforcement of rights, not the exercise of judicial power. Judicial power remains and will always remain with the Judiciary unless and until art 121(1) of the Federal Constitution is amended or repealed. In any case, it is inconceivable to

A think that in a democratic setting, judicial power is reposed in any institution other than the Judiciary;

(b) entrenched practice of the court's jurisdiction and powers prescribed by Federal law does not violate the doctrine of separation of powers;

B (c) limiting the scope and extent on available remedies for enforcement of rights by Federal law does not impinge on judicial power.

[270] It is perhaps worth setting out excerpts of Abdul Rahman Sebli FCJ judgment in *Maria Chin* where in his usual eloquent manner explained the C rationale of the inapplicability of the basic structure doctrine in the Malaysian context:

> [570] I must start by saying that it is not so much the existence of 'basic structures' in the Federal Constitution that gives rise to controversy. There is nothing wrong to describe the fundamental features of the Federal Constitution as its 'basic D structures'. What poses a problem in the context of a written constitution is the application of the so-called 'doctrine' of basic structure. Under the doctrine, any law passed by Parliament that 'offends' the Federal Constitution is void.
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> [571] The difficulty with the doctrine is that 'basic structure' is not confined to the written terms of the Federal Constitution. It has been extrapolated to include a E doctrine of law, in this case the doctrine of separation of powers. This leads to a situation where a law that is duly passed by Parliament is rendered void for offending the doctrine of separation of powers even where it is not inconsistent with the express terms of the Federal Constitution. Herein lies the paradox.

F **[271]** In *Rovin Joty*'s the issue before this court is whether s 15B of the POCA limits the exercise of judicial power and is ultra vires cl (1) of art 121 of the FC. In support of this, the appellant in that case relied on the basic structure doctrine. It was succinctly explained by Zabariah Mohd Yusuf FCJ that the reliance on the basic structure concept premised on the trilogy of cases to strike G down s 15B of the POCA enacted by Parliament pursuant to art 149 of the FC is misplaced:

> [414] In the context of the challenge in the present appeal, the determination of the constitutionality of the impugned provision has to be based on what is provided in H the FC. It cannot be premised on some foreign basic structure concept which is amorphous where uncertainty will ensue in the application of our law. Historically, and textually, there is nothing in our Constitution to indicate which provision constitutes basic structure and hence, unamendable or to remain as eternity clause.
>
> [415] One must bear in mind of the dangers of relying on concepts/theories which I had developed mostly in foreign countries, as they evolved from the historical, social and political context of foreign nations. The basic structure concept which took root in an alien soil under a distinctly different Constitution and differs from our own historical and constitutional context, should not be pressed into use in aid of interpretation of our very own FC. There is a need for deeper analysis of the rationale and specific historical background which underpins such foreign

doctrines, no matter how popular it may seem. The basic structure concept was accepted by the courts in India at the material time due to the political and social climate surrounding the composition of the Executives and the Judiciary at that time which was only peculiar to India then. Such is not the situation in this country.

[416] The adoption of the basic structure doctrine would create a situation that although Parliament had followed the procedure in amending the laws as stated in art 159, nevertheless the courts can strike it down, if in the opinion of the courts that the amending law struck at the basic structure of the FC. Hence, the court will declare that Parliament has no power to amend that particular article when art 159 of the FC allows it, if the correct procedure is followed. Does that not seem like the courts are over and above the FC, thus going against what art 4(1) provides?

[417] Hence, to sum up, on point no (iv): given the aforesaid, the basic structure doctrine is not applicable in construing the constitutionality of s 15B(1) of the POCA in view of art 159. There is nothing stated in the FC as to which provision in the FC forms the basic structure. To challenge the constitutionality of s 15B of the POCA, it has to be tested against any of the provisions of the FC, not against the concept of basic structure. Section 15B of the POCA derived its force of law and validity from art 149 of the FC. It cannot be said that s 15B oust the courts from exercising its powers under arts 4(1) or 121(1) of the FC. The courts can exercise its supervisory judicial powers in cases where there is non-compliance of procedural requirement. It is not the basic structure that an aggrieved person is entitled to the fullest form of remedy in challenging a public authority's decision. Neither can it be said to contravene art 4(1) and to that extent contravenes the 'basic structure' of the FC.

Effect Of The Trilogy Of Cases

[418] Counsel for the appellants relied on the trilogy of cases of *Semenyih Jaya*, *Sivarasa Rasiah* and *Indira Ghandi* to support the contention of the unconstitutionality of s 15B of the POCA. However, such reliance is misplaced as to the facts and constitutional issues raised in the trilogy of cases are distinguishable and the provisions which the cases dealt with were not enacted pursuant to art 149 of the FC. The distinguishing facts and issues in the trilogy of cases are as follows:

(a) *Sivarasa Rasiah* concerned a challenge by the appellant on the provision of the Legal Profession Act 1976 as to his rights to be elected to the Bar Council;

(b) *Semenyih Jaya* is a challenge against s 40D of the Land Acquisition Act 1960 which claimed that the presence of assessors in the determination of compensation to owners of land acquired usurps the powers of the court; and

(c) *Indira Ghandi* relates to the jurisdiction of the civil courts in dealing with whether the certificate of conversion issued by Pengarah Jabatan Agama Islam Perak which converted the three children of Mrs Indira Ghandi is valid. It concerned the interpretation of art 121(1A) of the FC, in particular whether the clause had the effect of granting exclusive jurisdiction on Syariah Court in all matters of Islamic law including those relating to judicial review. Hence, *Indira Ghandi* concerned a

jurisdictional issue whether the Syariah Court had certain powers to the exclusion of the civil courts.

[419] All the impugned legislations in the three aforesaid cases were not enacted pursuant to art 149 of the FC and it has got nothing to do with laws pertaining to preventive detention or national security of the country. In addition, there was never any attempt to amend any of the provisions of the FC in the trilogy of cases cited, that justified the importation of the basic structure concept.

[420] The distinguishing factor between the trilogy of cases and the present appeals is that, the present appeals are not concerned with the issue of removal of judicial power or conferment of judicial power to non-judicial branch (as in *Semenyih Jaya*) or jurisdictional issue (as in *Indira Ghandi*).

[421] This court in *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1; [2007] 6 CLJ 341, referred and agreed to the reasoning by Raja Azlan Shah FJ in *Loh Kooi Choon v Government of Malaysia* which held that in determining the 'constitutionality or otherwise of a statute under our Constitution by the court of law, it is the provision of our Constitution that matters, not a political theory by some thinkers' and that 'The ultimate touchstone of constitutionality is the Constitution itself and not any general principle outside it'.

[422] That has been the position until *Sivarasa Rasiah* was decided by this court in 2010. The learned judge in *Sivarasa Rasiah* made three preliminary observations and imported the basic structure concept in reliance on *Kesavananda Bharati*. It is undisputed that *Sivarasa Rasiah* was never about the challenge on the basic structure of the FC and neither was it an attempt to amend the provision of the FC. From the three broad grounds relied upon by the appellant therein, he was challenging s 46(1) of the Legal Profession Act 1976 as against specific provisions of the Constitution, namely:

(a) that the section violates his rights of equality and equal protection guaranteed by art 8(1) of the Constitution;

(b) that it violates his right of association guaranteed by art 10(1)(c); and

(c) that it violates his right to personal liberty guaranteed by art 5(1).

Notably also that, in the event the said section violates any provisions of the FC, the same would be struck down as being unconstitutional, regardless whether it forms the basic structure of the FC. Whatever may be the features of the basic structure of the FC, the impugned provision of the Legal Profession Act 1976 had not destroyed the basic structure (whatever that may be) of the FC. Neither was there any attempt by the appellant therein, to amend any provision of the FC. Hence there is no necessity to introduce or import the basic structure principle or the implied limitations on the power of constitutional amendment in *Sivarasa Rasiah*, as it was never applied any way. Therefore the decision of *Sivarasa Rasiah* vis a vis the basic structure doctrine, was, at best obiter.

[423] Despite the basic structure doctrine was never applied, the judgment in *Sivarasa Rasiah* established the principle and the law that some provisions of our FC form the basic structure of the FC and cannot be amended by Parliament at all, and

it was readily adopted by *Semenyih Jaya*. Further, the judgment also laid down the principle that if Parliament amends such provision which forms the basic structure of the FC, the court will (when challenged in court) strike down such amendment, although it was unclear as to which provision form the basic structure of the Constitution and where precisely would the courts obtain such powers to do so.

[424] Hence the reliance on the basic structure concept premised on the trilogy of cases to strike down s 15B, enacted by Parliament despite it being enacted according to art 149 is, with respect, misplaced.

[272] As I have alluded the doctrine of basic structure was and had been extensively argued by the parties in both *Maria Chin* and *Rovin Jothy*. In both of the appeals this court was aided by the written submissions of amicus curiae. Even if the parties were in consensus that the doctrine is applicable or otherwise, this court is not entirely precluded from considering and ultimately deciding on the issue before it. In light of the clear and purposeful intention of the architects of our Constitution as well as the judgments of this court in *Loh Kooi Choon*, *Phang Chin Hock* and more recently in *Letitia Bosman*, *Maria Chin* and *Rovin Joty*, the inevitable conclusion would be that the basic structure doctrine has no place in Malaysia. It therefore follows that the majority decisions in the aforementioned cases affirmed the true position of the law and thus binding.

THE FEDERAL CONSTITUTION

[273] To address the alleged infringements as argued by the appellants, it is instructive to set out the relevant articles of the FC. I begin with art 4 of the FC. Article 4 of the FC reads:

Article 4 Supreme Law of the Federation.

(1) This Constitution is *the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.*

(2) The *validity of any law* shall not be questioned on the ground that-

(a) it imposes restrictions on the right mentioned in Article 9(2) but does not relate to the matters mentioned therein; or

(b) it imposes such restrictions as are mentioned in Article 10(2) but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that Article.

(3) The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in proceedings for a declaration that the law is invalid on that ground or —

A (a) if the law was made by Parliament, in proceedings between the Federation and one or more States;

(b) if the law was made by the Legislature of a State, in proceedings between the Federation and that State.

B (4) Proceedings for a declaration that a law is invalid on the ground mentioned in Clause (3) (not being proceedings falling within paragraph (a) or (b) of the Clause) shall not be commenced without the leave of a judge of the Federal Court; and the Federation shall be entitled to be a party to any such proceedings, and so shall any State that would or might be a party to proceedings brought for the same purpose under paragraph (a) or (b) of the Clause 19. (Emphasis added.)

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[274] Clause (1) of art 4 of the FC declares the supremacy of our Federal Constitution and states that any law passed after Merdeka Day which is inconsistent with the provisions of the FC shall, to the extent of the D inconsistency, be void. Any legislation passed by Parliament after Merdeka in 1957 must be in accordance with the explicit provisions of the articles to the FC. Clause (1) of art 4 of the FC allows the competency of any legislation enacted by Parliament to be challenged and if found to be inconsistent with the FC, such impugned legislation can be declared void.

E

[275] The validity of any law shall not be questioned on the ground that it imposes restrictions on the right as stipulated in cl (2) of art 9 of the FC but does not relate to the matters mentioned therein as well if it imposes such restrictions as are provided in cl (2) of art 10 of the FC. However, those F restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that article (see cl (2) art 4 of the FC).

[276] Article 9 of the FC provides for the prohibition of banishment and freedom of movement and reads:

G (1) No citizen shall be banished or excluded from the Federation.

(2) *Subject to Clause (3) and to any law relating to the security of the Federation or any part thereof, public order, public health, or the punishment of offenders, every citizen has the right to move freely throughout the Federation and to reside in any part thereof.*

H (3) So long as under this Constitution any other State is in a special position as compared with the States of Malaya, Parliament may by law impose restrictions, as between that State and other States, on the rights conferred by Clause (2) in respect of movement and residence. (Emphasis added.)

I **[277]** Article 10 of the FC is on freedom of speech, assembly and association:

(1) Subject to Clauses (2), (3) and (4) —

(a) every citizen has the right to freedom of speech and expression;

(b) all citizens have the right to assemble peaceably and without arms;

(c) all citizens have the right to form associations.

(2) *Parliament may by law impose —*

(a) *on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence*;

(b) *on the right conferred by paragraph (b) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof or public order*;

(c) *on the right conferred by paragraph (c) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality.*

(3) Restrictions on the right to form associations conferred by paragraph (c) of Clause (1) may also be imposed by any law relating to labour or education.

(4) In imposing restrictions in the interest of the security of the Federation or any part thereof or public order under Clause (2)(a), Parliament may pass law prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III, art 152, 153 or 181 otherwise than in relation to the implementation thereof as may be specified in such law. (Emphasis added.)

[278] The word 'law' is defined under *art 160 of the FC*, the interpretation article or provision under the FC:

'Law' includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof;

[279] Article 160 of the FC also defines *'Federal Law'*:

'Federal law' *means —*

(a) *any existing law relating to a matter with respect to which Parliament has power to make laws,* being a law continued in operation under Part XIII; and

(b) *any Act of Parliament*; ...

[280] 'Written Law' under art 160 of the FC:

includes this Constitution and the Constitution of any State;

[281] The FC empowers Parliament, the legislative branch of the government to make laws with respect to any of the matters as listed in cl (1) of art 74 of the FC. Under art 4 of the FC the reference to the law will include written law that

A is, federal laws enacted by Parliament within the definitive confines of the Legislative List as provided under Ninth Schedule of the FC: the Federal List, the State List and the Concurrent List. Article of the 74 of the FC reads:

(1) Without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule).

(2) Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List.

(3) The power to make laws conferred by this Article is exercisable subject to any conditions or restrictions imposed with respect to any particular matter by this Constitution.

(4) Where general as well as specific expressions are used in describing any of the matter enumerated in the Lists set out in the Ninth Schedule the generality of the former shall not be taken to be limited by the latter.

[282] The article which is the basis of the displeasure and discontent of the appellants before us is art 149 of the FC:

(1) If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation —

(a) to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property; or

(b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or

(c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or

(d) to procure the alteration, otherwise than by lawful means, of anything by law established; or

(e) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or

(f) which is prejudicial to public order in, or the security of, the Federation or any part thereof, any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 or 13, or would apart from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.

[283] Article 149 of the FC is unique as it empowers the Parliament to enact

laws designed to stop or prevent any threat or danger to national security and public order by a body of substantial persons. Clause (1) of art 149 of the FC prescribes the circumstances such a legislation can be enacted and it is only for the purposes as specified in paras (a)–(f) of cl (1) art 149 of the FC. Under art 149 of the FC Parliament can also legislate law which is inconsistent with any of the provisions of art 5, 9, 10 or 13, or would apart from this article be outside the legislative power of Parliament. However, there are constitutional safeguards as provided by cl (1) of art 151 of the FC:

151 Restrictions on preventive detention

(1) Where any law or ordinance made or promulgated in pursuance of this part provides for preventive detention:

(a) the authority on whose order any person is detained under that law or ordinance shall, as soon as may be, *inform him of the grounds for his detention* and, subject to Clause (3), the allegations of fact on which the order is based, and shall give him the opportunity of making representations against the order as soon as may be;

(b) *no citizen shall continue to be detained under that law or ordinance unless an advisory board constituted as mentioned in Clause (2) has considered any representations made by him under paragraph (a) and made recommendations* thereon to the Yang di-Pertuan Agong *within three months of receiving such representations*, or within such longer period as the Yang di- Pertuan Agong may allow.

(2) ...

(3) ... (Emphasis added.)

[284] Article 159 of the FC empowers the Parliament to amend the FC:

Article 159 Amendment of the Constitution

(1) Subject to the following provisions of this Article and to Article 161E the *provisions of this Constitution may be amended by federal law*.

(2) *(Repealed)*.

(3) A Bill for making any amendment to the Constitution (other than an amendment excepted from the provisions of this Clause) and a Bill for making any amendment to a law passed under Clause (4) of Article 10 shall not be passed in either House of Parliament *unless it has been supported on Second and Third Readings by the votes of not less than two-thirds of the total number of members of that House.*

(4) The following amendments are excepted from the provisions of Clause (3), that is to say:

(a) any amendment to Part III of the Second or to the Sixth or Seventh Schedule;

(b) any amendment incidental to or consequential on the exercise of any power to make law conferred on Parliament by any provision of this Constitution other than Articles 74 and 76; (bb) subject to Article 161E

A any amendment made for or in connection with the admission of any State to the Federation or its association with the States thereof, or any modification made as to the application of this Constitution to a State previously so admitted or associated;

B (c) any amendment consequential on an amendment made under paragraph (a).

(5) A law making an amendment to Clause (4) of Article 10, any law passed thereunder, the provisions of Part III, Article 38, 63(4), 70, 71(1), 72(4), 152, or 153 or to this Clause shall not be passed without the consent of the Conference of Rulers.

C (6) In this Article 'amendment' includes addition and repeal; and in this Article and in Article 2(a) 'State' includes any territory.

[285] The articles as contained in the FC are of equal stature and importance D and therefore must be interpreted harmoniously. The Judiciary is the first vanguard and the final bastion of defense against any challenge to the FC and the laws legislated by Parliament. It is inherently clear and unequivocal that the cardinal rule when interpreting the FC and determining the intent of the article, the language of the FC must neither be tampered nor tempered. A E puritanical stance is necessary so that the FC must be read and construed as the architects of the Constitution had designed it to be. NS Bindra's *Interpretation of Statute* (8ht Ed) at p 857 described the Constitution as:

... the very framework of the body policy: its life and soul; it is the fountain head of F all its authority, the mainspring of all its strength and power: The Executive, the Legislative, and the Judiciary are all its creations and derive their sustenance from it. It is unlike other statutes which can be at any time altered, modified or repealed.

Therefore, the language of the Constitution should be interpreted as if it were a living organism capable of growth and development of interpreted in the broad and G liberal spirit and not in a narrow and pedantic sense.

[286] Salleh Abas LP in *Lim Kit Siang v Dato Seri Dr Mahathir Mohamad* [1987] 1 MLJ 383; [1987] 1 CLJ 40; [1987] CLJ Rep 168 said in his erudite judgment:

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The courts have a constitutional function to perform and they are the guardian of the constitution within the terms and structure of the Constitution itself; they not only have the power of construction and interpretation of legislation but also the power of judicial review — a concept that pumps through the arteries of every I constitutional adjudication and which does not imply the superiority of judges over legislators but of the Constitution over both. The courts are the final arbiter between the individual and the state and between individuals inter se, and in performing their constitutional role they must of necessity and strictly in accordance with the constitution and the law be the ultimate bulwark against unconstitutional legislation or excesses in administrative action.

[287] To discourage and prevent frivolous or vexatious challenges on the relevant legislation, the validity or constitutionality of the laws could not be questioned by way of collateral attack. The Supreme Court in *Stephen Kalong Ningkan v Tun Abang Haji Openg & Tawi Sli (No 2)* [1967] 1 MLJ 46 at p 49 held that cll (3) and (4) of art 4 of the FC are designed to prevent the possibility of the validity of laws made by the legislature being questioned on the ground mentioned in that article incidentally. Article 4 requires that such a law may only be questioned in proceedings for a declaration that the law is invalid. In other words, there must be a specific declaration of invalidity.

[288] The presumption of constitutionality means that the Judiciary must presume that Acts legislated by Parliament to be constitutional. When scrutinising any challenge to the Constitution, the court should try to sustain the validity of the legislation. It is only when it is not possible to constitutionally sustain it then the court can strike it down. Hashim Yeop Sani J in *Public Prosecutor v Su Liang Yu* [1976] 2 MLJ 128 explained this presumption succinctly and alluded that when Parliament performs its legislative powers the interest and the needs of the Nation has been taken into consideration:

> (8) It must be presumed that the legislature understands and correctly appreciates the need of its own people and that its laws are directed to problems made manifests by experience and that its discriminations are based on adequate grounds provided however that while good faith and knowledge of the existing conditions on the part of the legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances on which the classification may be reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of holding that there must be some undisclosed and unknown reasons for the discrimination.

[289] Hashim Yeop Sani SCJ again in *Abdul Karim bin Abdul Ghani v Legislative Assembly of Sabah* [1988] 1 MLJ 171 observed:

> Article 4(3) and (4) of the Federal Constitution is designed to prevent the possibility of the validity of laws made by the Legislature being questioned on the ground mentioned in that article incidentally. The article requires that such a law may only be questioned in proceedings for a declaration that the law is invalid. The subject must ask for a specific declaration of invalidity in order to secure that frivolous or vexatious proceedings for such declarations are not commenced. Article 4(4) requires that the leave of a judge of the Supreme Court must first be obtained.

[290] In the same vein, the Federal Court in through the majority judgment of Ariffin Zakaria Chief Justice in *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors* [2014] 4 MLJ 765 held that the party seeking to challenge the validity or constitutionality of the impugned provision must specifically ask for a declaration that the law is invalid, and such a proceeding may only be commenced with leave of a judge of the Federal Court:

A [42] The effect of cl (3) and (4) of art 4 as explained by the Supreme Court in *Abdul Karim bin Abdul Ghani* is that the validity or constitutionality of the laws could not be questioned by way of collateral attack, as was done in the present case. This is to prevent any frivolous or vexatious challenge being made on the relevant legislation. Clause (3) of art 4 provides that the validity or constitutionality of the relevant B legislation may only be questioned in proceedings for a declaration that the legislation is invalid. And cl (4) of art 4 stipulates that such proceedings shall not be commenced without the leave of a judge of the Federal Court. This procedure was followed in a number of cases (see *Fathul Bari bin Mat Jahya*; *Sulaiman bin Takrib v Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications* [2009] 6 MLJ 354; [2009] 2 CLJ 54 (FC); *Mamat bin Daud & Ors v Government* C *of Malaysia* [1986] 2 MLJ 192; [1986] CLJ Rep 190 (SC)).

[291] The appellants in these appeals sought to declare s 4 of the POCA as invalid as it is *inconsistent with the pre-amended* art 121(1) of the FC. In essence, D a collateral attack on the validity of the amendment to art 121 of the FC in 1988. This collateral attack against the validity of art 121(1) FC cannot be sustained. I simply cannot ignore these plethora of wise decisions of this court on this issue. A specific declaratory application must be made under art 4 of the FC which the appellants failed to do so.

E

THE DOCTRINE OF SEPARATION OF POWERS

[292] In his book 'An Introduction to the Constitution of Malaysia' Mohamed Suffian Hashim described the Constitution as a partnership F agreement regulating the relations between the three branches:

> Our constitution is a working document. It is a partnership agreement regulating the relations between the component members of the federation. Every partner insisted on safeguards for its own interests and consequently the constitution contains *minutiae* not to be found in other constitutions. That the framers of the G constitution themselves regarded these as *minutiae* is obvious from the fact they provided that some provisions may be amended by a simple majority. As a working document, the constitution is in use every day by all fourteen governments. When certain provisions are found from experience to be unsatisfactory or no longer appropriate to present circumstances, should these provisions be regarded as sacred H and immutable? Or should they be amended to bring them in accord with current needs and thinking? A balance has to be struck between the two opposing points of view implied in these questions. The Alliance Government has been fortunate in that it commanded a comfortable two-thirds majority between 1957 and 1969 and could amend the constitution whenever it considered necessary. What happens if our Government cannot enact constitutional amendments that are regarded as I essential? Probably the public will feel then that the constitution is too rigid and Malaysians will look back with nostalgia to earlier times when the constitution could be amended as and when the need for it arose.

[293] Clause (1) of art 4, art 128 and cl (6) of art 162 of the FC provide in

clear and unequivocal terms that Parliament exercises its powers subject to the provisions of the Constitution. The Legislature, the Judiciary and the Executive derive its respective powers from the FC and though independent of each other the three branches in fact co-exist which is why under specific circumstances, the powers, may overlap. Tun Abdul Hamid Mohamad PCA (as he then was) in *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1 explained this unique feature of our FC:

> [17] In other words we have our own model. *Our Constitution does have the features of the separation of powers and at the same time, it contains features which do not strictly comply with the doctrine. To what extent the doctrine applies depends on the provisions of the Constitution. A provision of the Constitution cannot be struck out on the ground that that it contravenes the doctrine. Similarly no provision of the law may be struck out as unconstitutional if it is not inconsistent with the Constitution, even though it may be inconsistent with the doctrine. The doctrine is not a provision of the Malaysian Constitution even though no doubt, it had influenced the framers of the Malaysian Constitution, just like democracy*. The Constitution provides for elections, which is a democratic process. That does not make democracy a provision of the Constitution in that where any law is undemocratic it is inconsistent with the Constitution and therefore void. (Emphasis added.)

[294] Expressing the same view and concern, Azahar Mohamed FCJ (as he then was) in *JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners)* [2019] 3 MLJ 561; [2019] 5 CLJ 569 explained the defined demarcation of the three branches and cited Professor Dr Shad Saleem Faruqi in *Document of Destiny, The Constitution of the Federation of Malaysia*:

> [155] It has been said that for one branch of the Government to usurp the rightful authority and power of another is to undermine the doctrine of separation of powers. Having said that, I note at the same time *that the doctrine recognises that, where necessary, one branch of the Government should be allowed to exercise part of the powers of another branch and the delegation of power by one branch of the Government to another*. This point is made by Professor Dr Shad Saleem Faruqi in *Document of Destiny, The Constitution of the Federation of Malaysia*, with the necessary emphasis, at p 48:
>
> > *It is wrong to suggest that the powers of the state are neatly divisible into three categories. The truth is that each of the three functions of Government contains elements of the other two and that any attempt rigidly to define and separate these functions must either fail or cause serious inefficiency in Government*. For example, if the Ministry of Higher Education, on being satisfied that a candidate meets the criterion, which it has laid down for awards of scholarships, makes a financial grant to the student, then its act is plainly an executive or administrative act. But if the Ministry were to elaborate in detail the conditions under which a student qualifies for a grant, and issues circulars setting out such conditions for information and compliance by all educational institutions, this action would seem to be the formulation of a general rule ie a legislative or *quasi*-legislative act. The function of the Ministry could be regarded as legislative from one point of

A view and as administrative from another.

Under the conditions prevailing at this time, it would be highly inconvenient and unworkable to insist on a rigorous separation of powers. *For example, due to a lack of time and expertise, Parliament is not able to frame each and every law which governs the citizen. Quite often, it delegates its legislative power to members of the executive who then frame rules and regulations on its behalf*. Such framing of legislation by an authority other than Parliament, on parliamentary delegation, is called subsidiary or delegated legislation. It is a power unmistakably legislative (because it relates to the making of laws) yet it is exercised by a delegate belonging to either the executive or judicial branch.

Similarly, the courts today have a backlog of cases. If all income tax and industrial disputes were to be heard in the first instance by the ordinary courts of the land, the administration of justice will be even slower than it is today and the system may get choked up. Administrative tribunals like income tax tribunals or labour tribunals are created by Parliament to decide on disputes in their specialised fields. Administrative tribunals are mostly composed of legally trained persons who are not judges of the courts, yet they perform a judicial function. They are, therefore, called *quasi*-judicial bodies-partly judicial, partly administrative.

Parliamentary democracies require a blending and not a separation of the executive and legislative branches.

[156] In commenting on the version of strict of powers by Montesquieu, *Professor Dr Shad Saleem Faruqi in his latest book, 'Our Constitution' published in 2019 explained at p. 62, that 'the executive, legislative and judicial functions are overlapping and cannot be separated in a water-tight way. Nor should they be rigidly separated'*. (Emphasis added.)

[295] Undeniably a delicate demarcation exists between the branches, and such a porous border may inevitably lead to an overlapping of powers. Nevertheless, each component respecting and safeguarding the powers anointed respectively to it under the FC.

[296] The creation of the offence whether it is criminal offence or security offence is a prerogative right of the Parliament as well as a policy consideration. A question that involved controversial moral and social issues and legislative policy are matters within the purview of Parliament to determine. The majority in *Letitia Bosman* through the judgment of Azahar Mohamad CJ (Malaya) held that the Parliament has the legislative power to enact offences and prescribe its punishment:

In my opinion controversial matter of policy involving differing views on the moral and social issues involved is one circumstance where parliament is better placed to assess the needs of society and to make difficult choices between competing considerations. Courts should accept and recognise parliament is better placed to perform those functions.

...

> *The presumption of constitutionality exists because Parliament is deemed better placed than the Courts to determine social policy. Parliamentarians are democratically elected and represent the will of the people.*
>
> ...
>
> Indeed, controversial matter of policy involving differing views on the moral and social issues involved is inherently a matter for determination by the elected Legislature rather than the court.
>
> ...
>
> With respect, I fully agree with the views of Lord Sumption that generally matters concerning sensitive and controversial moral and social issues are inherently legislative questions, calling for the representatives of the general body of citizens to decide on them. As he observed the parliamentary process is a better way of resolving issues involving controversial and complex questions of fact arising out of moral and social dilemmas. His opinion can be viewed as a case in which court attach weight to the judgment of the democratically elected legislature. (Emphasis added.)

[297] In performing its functions as a legislative body, Parliament must undoubtedly take into consideration the needs and interests of the Nation, and at times, paramount above the needs of the individual. Parliament is in a better position to formulate policy and legislate laws within the definitive boundaries of the FC. The Judiciary's role is to ensure the checks and balances are observed by the Legislature and the Executive as prescribed by the FC. Lord Bingham in *R (on the application of Quintavelle (on behalf of Pro-Life Alliance)) v Secretary of State for Health* [2003] UKHL 13; [2003] 2 AC 687, para 8 explained the role of the court:

> The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment

Legislative history of the POCA and the related provisions

[298] It is important to understand the historical background of the legislation in question. POCA was enacted as an Ordinance in 1959 (FM Ordinance No 13 of 1959) and was revised in 1983. When the Prevention of Crime Bill, 1959 was tabled in the Legislative Council, 62 years ago on 19 February 1959 by the Hon Encik Suleiman, Minister of Interior and Justice, he explained in his speech the objective and intent of the Bill. The concerns which forms the basis of the Bill were the criminal activities by secret societies, gangsters and triads and the threat of the activities to public safety and order:

> ... The First Schedule makes it perfectly clear against whom the provisions of the Bill are designed, namely, secret society members, gangsters, thugs, extortioners, (sic) opium dealers, pimps and keepers of brothels and gambling dens ...

> Members of this House may not themselves have suffered from intimidation and extortion, but I think that most Hon'ble Members are aware that there has been an upsurge of such undesirable activity in certain areas of the Federation and that many small businessmen, hawkers and workers live in fear of thugs and are intimidated into paying money to secret society gangs. If there was a greater sense of civic consciousness and readiness to give information and evidence, the grip of the gang could easily be broken but the victims are generally simple people, who are terrorized and unwilling to give evidence in open Court.
>
> ... All this will take time and meanwhile must accept the fact that it is left to Government to take necessary action to protect society and prevent criminal associations developing into a dangerous menace ...
>
> ... Previously, the activities of secret society gangsters were to some extent controlled by the application of the Banishment Law, but this is rightly under our Constitution no longer applicable to Federal Citizens and we must take other action to deal with those bad elements in our midst who prey on their fellow Malayans. The method proposed in this Bill is to attempt to identify such persons and to place their names on a Register. They will then be liable to be subjected to certain restrictions which it is hoped will prevent or deter them from committing crimes, and if they do commit crimes make it easier for them to be apprehended by the Police and, if convicted of any of the offences listed under the Second Schedule, liable to double the normal maximum penalty or imprisonment and if the Court deems fit whipping also.
>
> ...
>
> This Bill is strong medicine. I have tried in this speech to explain Government's objects and intentions and the safeguards against possible abuse. The real safeguard however is not anything in the Bill itself but public opinion. If the provisions of the Bill are in the opinion of the general public abused them then the fact of registration which is the essence of the Bill will cease to have any deterrent effect but I and any colleagues of the Alliance Government are confident that it will be properly used and will be a valuable weapon to deal with the small number of thugs and gangster elements who plague the mass of honest and law abiding citizens.

[299] POCA was originally enacted as an ordinary legislation applicable only to West Malaysia. Subsequently, in 2014 by the Prevention of Crime (Amendment and Extension) Act 2014 (Act A1459) POCA became a law pursuant to art 149 of the FC, applicable throughout Malaysia.

> *Now, Therefore, pursuant to Article 149 of the Federal Constitution It Is Enacted by the Parliament of Malaysia as follows:*

[300] The *Explanatory Statement to Act A1459* clarified that in order to allow the introduction of detention without criminal charge or trial as previously provided in the repealed Emergency (Public Order and Prevention of Crime) Ordinance 1969 (Ordinance 5, 1969, PU(A) 187/1969) and the Internal Security Act 1960 (Act 82), Act 297 is to be changed to a law made pursuant to art 149 of the Federal Constitution, and its application extended throughout

Malaysia. The other provisions in POCA were amended to enhance the inquiry process to determine whether a person should be subject to registration and supervision under the Act.

[301] As reported in the *Hansard* during the debate of Act A1459 in the Dewan Rakyat the Home Minister explained the reasons for the proposed amendment:

> ... Namun begitu, sejak kebelakangan ini kadar peratusan jenayah berat, dan jenayah terancang daripada keseluruhan jenayah indeks telah berlaku peningkatan. *Peningkatan kes-kes jenayah berat dan jenayah terancang ini sedikit sebanyak telah meningkatkan kebimbangan rakyat akan tahap keselamatan mereka berikutan keseriusan kes-kes jenayah yang berlaku seperti mana yang dilaporkan di dalam media massa iaitu: (i) penggunaan senjata api yang berleluasa; (ii) kejadian pembunuhan menggunakan senjata api; (iii) pergaduhan antara kumpulan ahli-ahli kongsi gelap sesama mereka untuk merebut kawasan; (iv) perebutan kawasan pengedaran dadah; (v) pengutipan wang perlindungan; (vi) sindiket pelacuran; dan (vii) sindiket perjudian*. Kerajaan amat peka akan kebimbangan yang dirasai oleh rakyat, dan mendengar rintihan mereka agar kerajaan mengambil tindakan segera bagi membanteras aktiviti-aktiviti jenayah berat dan jenayah terancang. *Justeru bagi meredakan kebimbangan ini, terdapat keperluan untuk kerajaan menimbang dan mengkaji semula usaha-usaha menangani jenayah terutamanya jenayah berat dan jenayah terancang termasuklah dengan mengkaji undang-undang yang sedia ada. Tanpa undang-undang yang efektif, kegiatan jenayah berat dan jenayah terancang tidak dapat dibendung dengan secara berkesan dan seterusnya akan menjadi ancaman kepada keselamatan negara.* Dari aspek sosial, selain daripada peningkatan kadar jenayah, golongan pelajar juga akan menjadi sasaran oleh ahli-ahli kongsi gelap sama ada mereka merekrut ahli-ahli baru bagi menyertai kumpulan mereka ... terancang tidak dapat dibendung. Tidak dapat dibendung dengan berkesan dan seterusnya akan menjadi ancaman kepada keselamatan negara. Dari aspek sosial selain peningkatan kadar jenayah, golongan pelajar juga akan menjadi sasaran oleh ahli-ahli kongsi gelap sedia ada untuk merekrut ahli-ahli baru bagi menyertai kumpulan mereka. Sekiranya enggan, mereka tanpa belas kasihan akan terus mengancam pelajarpelajar ini sehingga sanggup mencederakan sesiapa sahaja yang tidak mengikut kemahuan mereka. Keadaan ini akan menyebabkan anak-anak kita berasa takut sehingga menjejaskan pelajaran mereka. *Dalam masa yang sama aktiviti-aktiviti seperti penyalahgunaan dadah, perjudian, maksiat dan pergaduhan di tempat-tempat awam akan turut meningkat sehingga suasana di bandar-bandar dan kawasan-kawasan perumahan menjadi tidak aman seperti sedia kala. Dari aspek ekonomi, kumpulan kongsi gelap yang bermaharajalela akan menjejaskan keyakinan pelabur asing dan pelabur tempatan juga. Sebagai contoh pelabur-pelabur dan peniaga- peniaga akan merasa bimbang untuk menjalankan perniagaan mereka kerana dipaksa membayar wang perlindungan kepada kumpulan kongsi gelap yang memeras mereka*. Kadar jenayah berat yang tinggi juga akan menyebabkan pelancong berasa tidak selamat dan tidak memilih untuk melancong ke negara ini. Akhirnya pembangunan ekonomi akan terencat dan seterusnya menjatuhkan nilai mata wang negara. Dari sudut politik pula terdapat juga kemungkinan kumpulan-kumpulan jenayah terancang untuk mempengaruhi ahli-ahli politik dan pegawai-pegawai kerajaan bagi melindungi kegiatan mereka. Sekiranya hal ini

dibenarkan berlaku maka institusi-institusi kerajaan akan kehilangan kredibiliti dan kewibawaan serta seterusnya menyebabkan kerugian besar kepada negara. (Emphasis added.)

THE CONSTITUTIONALITY OF SECTION 4 OF THE POCA

[302] The basis for challenging the constitutionality of s 4 of the POCA by the appellants is the absence of judicial discretion and thus a contravention to the doctrine of separation of power. Learned counsel for the appellants argued that s 4 of the POCA is unconstitutional as it violates the doctrine of separation of powers by requiring the judicial arm to act upon the dictate of the Executive violating the provision of the unamended cl 1 of art 121 of the FC. Under s 4 of the POCA the magistrate's hands are tied, so to speak as he or she has no discretion as to the imposition of detention and the period of detention.

[303] Section 4 of the POCA deals specifically with the procedure before a magistrate. To appreciate and understand the arguments of the both parties, s 4 POCA is reproduced:

(1) Whenever any person is taken before a Magistrate under subsection 3(2) *the Magistrate shall* —

(a) *on production of a statement in writing* signed by a police officer not below the rank of Inspector stating that there are grounds for believing that *the name of that person should be entered on the Register, remand the person in police custody for a period of twenty one days;* or

(b) if *no such statement is produced, and there are no other grounds on which the person is lawfully detained, direct his release*.

(2) Any person remanded under paragraph (1)(a) shall, unless sooner released, on or before the expiry of the period for which he is remanded be taken before a Magistrate, who shall —

(a) on production of:

(i) a statement in writing signed by the Public Prosecutor stating that in his opinion sufficient evidence exists to justify the holding of an inquiry under section 9; and

(ii) a statement in writing signed by a police officer not below the rank of Assistant Superintendent stating that it is intended to hold an inquiry into the case of that person under section 9, order the person to be remanded in custody for a period of thirty eight days; or

(b) if no such statements are produced, and there are no other grounds on which the person is lawfully detained, direct his release.

(2A) No person shall be arrested and detained under this section solely for his political belief or political activity.

(3) Except as provided in subsection 9(5), the provisions of section 28A of the Criminal Procedure Code shall apply to any person remanded under section 4.

(4) The Public Prosecutor may appear in any application made under this section.

(5) For the purpose of this section, 'political belief or political activity' means engaging in a lawful activity through —

(a) the expression of an opinion or the pursuit of a course of action made according to the tenets of a political party that is at the relevant time registered under the Societies Act 1966 [Act 335] as evidenced by —

(i) membership of or contribution to that party; or

(ii) open and active participation in the affairs of that party;

(b) the expression of an opinion directed towards any government in Malaysia; or

(c) the pursuit of a course of action directed towards any government in Malaysia.

[304] When a legislation or a provision of the legislation is challenged for being inconsistent with the FC it must specifically state and identify the article of FC the impugned legislation is said to be violating. In these appeals before us the primary concern of the appellants is the period of remand of *21 days* issued by the magistrate and that under POCA the magistrate has no discretion but to order the 21 days' remand as expressly provided. This according to the appellants erodes the discretionary power of the magistrate, a clear violation of the pre-amended cl (1) of art 121 of the FC.

[305] Under s 4 of the POCA, the magistrate shall on production of a statement in writing which must states the grounds for believing that the name of that person should be entered on the Register, remand the person in police custody for a period of twenty one days. However, if no written statement is produced and no satisfactory grounds on which the person is lawfully detained is given, the magistrate may direct his release. This shows the presence of judicial discretion under s 4 of the POCA. To say otherwise, with greatest of respect, is clearly a misinterpretation of the law. There is no element of executive dictation, an unnecessary illusion of the purpose and intent of the law.

[306] First and foremost, any challenge of the constitutionality of s 4 of the POCA must be based on the *existing provision of* art 121 of the FC, and not based on the provision of art 121 of the FC before it was amended as suggested by learned counsel for the appellants.

[307] We must examine carefully cl (1) of art 121 FC. *Before the amendment*, cl (1) of art 121 FC reads:

A Subject to Clause (2) *the judicial power of the Federation shall be vested in two High Courts* of co-ordinate jurisdiction and status, namely —

(a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry in Kuala Lumpur; and

B (b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Borneo and shall have its principal registry at such place in the States

(c) (Repealed),

C and in such inferior courts *as may be provided by federal law.*

[308] *After the amendment* in 1988 cl (1) of art 121 of the FC reads:

Article 121 Judicial power of the Federation

D (1) There shall be two High Courts of co-ordinate jurisdiction and status,namely —

(a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and

E (b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;

(c) *(Repealed).*

F and such inferior courts as may be provided by federal law and *the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.*

[309] The words 'judicial powers' remained in the title of the article but were G deleted from the text by the Constitution (Amendment) Act 1988 (Act A704) on 10 June 1988. However, judicial powers still vest in the courts as evident from the language of cl (1) of art 121 of the FC that the courts' jurisdiction is expressly conferred by written laws enacted by Parliament:

... the High Courts and inferior courts shall have such jurisdiction and powers as may be H *conferred by or under federal law.*

[310] Abdul Hamid Mohamad PCA (as he then was) explained with clarity in *Public Prosecutor v Kok Wah Kuan*:

I [11] ... there is no longer a specific provision declaring that the judicial power of the Federation shall be vested in the two High Courts. What it means is that there is no longer a declaration that 'judicial power of the Federation' as the term was understood prior to the amendment vests in the two High Courts. *If we want to know the jurisdiction and powers of the two High Courts we will have to look at the federal law. If we want to call those powers 'judicial powers', we are perfectly entitled to.*

But, to what extent such 'judicial powers' are vested in the two High Courts depend on what federal law provides, not on the interpretation of the term 'judicial power' as prior to the amendment. That is the difference and that is the effect of the amendment. Thus, to say that the amendment has no effect does not make sense. There must be. (Emphasis added.)

[311] To interpret a law based on a provision that no longer reflects the position of the law, no longer in existence by virtue of an amendment, is misconceived and defies not only the canons of construction and interpretation but legal logic as well. To do so will create a fallacious precedent that will inevitably lead to unprecedented consequences. The absence of the words 'judicial powers' under art 121 of the FC does not in any manner or form emasculate the powers of the courts. *Au contraire*, the jurisdiction and powers of the Judiciary remain intact with the Judiciary. Until and unless cl (1) art 121 of the FC is amended, the jurisdiction and powers of the courts are as conferred by Federal law. Thus, it necessarily follows the jurisdiction and powers of the courts under POCA do not violate the amended art 121 of the FC.

THE SCHEDULE TO POCA

[312] With regards to the Schedule to POCA learned counsel for the appellants argued that by including 'unlawful gaming' in para 5 of Part I of the First Schedule of the POCA falls beyond the ambit of 'organised violence' against persons or property. Learned counsels for the appellants contended that by incorporating 'unlawful gaming' the Minister had abused his power under s 22 of the POCA as unlawful gaming is not a crime which can be classified as being as organised violence. The Minister had wrongly classified it as coming within the recital as prescribed by the FC and by doing so had acted ultra vires POCA.

[313] Learned counsel for the appellants further argued that gambling is not of a pervading character disturbing the general peace, tranquility and order of society and therefore does not affect public order, thus a fortiori it cannot come within the phrase 'organised violence against persons or property' which governs the spirit and intendment of the POCA. It is the submission of the appellants that 'unlawful gaming' is not within the definition of 'organised violence against persons or property'.

[314] Section 22 of the POCA empowers the Minister to amend the Schedules to the Act as and when necessary and it reads as follows:

The Minister may, by order published in the *Gazette*, amend the Schedules.

[315] Part I of the First Schedule lists the Registrable Categories as follows:

A

1. All members of unlawful societies which —

   (i) use Triad ritual; or

   (ii) are constituted or used for purposes involving the commission of offences that are seizable under the law for the time being in force relating to criminal procedure; or

B

   (iii) maintain secrecy as to their objects.

2. Persons who belong to or consort with any group, body, gang or association of two or more persons who associate for purposes which include the commission of offences under the Penal Code.

C

3. All traffickers in dangerous drugs, including persons who live wholly or in part on the proceeds of drug trafficking.

4. All traffickers in persons, including persons who live wholly or in part on the proceeds of trafficking in persons.

D

5. *All persons concerned in the organisation and promotion of unlawful gaming.*

6. All smugglers of migrants, including persons who live wholly or in part on the proceeds of smuggling of migrants.

E

7. Persons who recruit, or agree to recruit, another person to be a member of an unlawful society or a gang or to participate in the commission of an offence.

8. Persons who engage in the commission or support of terrorist acts under the Penal Code. (Emphasis added.)

F

[316] We cannot summarily dismiss para 5 of Part I of the First Schedule which has been in existence since POCA was promulgated in 1959, when Act A1459 amending POCA into a preventive law was laid down in Parliament, debated and passed, and even before art 121 of the FC was

G

amended. The original text reads as follows:

> 5 All persons *habitually* concerned in *the organisation and promotion of unlawful gaming*. (Emphasis added.)

H

[317] The word 'habitually' was deleted in 2014 vide the Prevention of Crime (Amendment of First and Second Schedule) Order 2014 [PU(A) 122/2014]. With the deletion para 5 reads:

> 5. All persons concerned in the organisation and promotion of unlawful gaming.

I

[318] It can be surmised that from its inception in 1959, the Legislature had intended to include unlawful gaming as one of the categories under POCA. Parliament saw the necessity more than sixty years ago to include the organisation and promotion of unlawful gaming activities as such activities by secret societies, triads, gangsters operating gambling dens resulted in an

upsurge of undesirable criminal activity, causing many people in business, hawkers and workers to live in fear. With the advent of technology, the organisation and promotion of unlawful gaming have become more sophisticated. Secret societies, triads and gangsters of yesteryears have morphed into criminal syndicates and cartels.

[319] The meaning of 'organised violence against persons or property' must be assessed through the context and the entire scheme of the POCA. The words 'organised violence against persons or property' must not be interpreted restrictively as suggested. Unlawful gaming activity has evolved into a much more sophisticated illicit activity that even in this present day constitutes a threat to public order and safety.

[320] The intent of the POCA as expressed in the long title of the Act is for effectual prevention of crime throughout Malaysia and for the control of criminals, members of secret societies, terrorists and other undesirable persons, and for matters incidental thereto.

[321] The CGHA is essentially an Act to suppress and control common gaming houses, public gaming and public lotteries. Therefore, unlike POCA, under CGHA lawful gaming is permitted by the issuance of a license by the Minister of Finance. Under s 27A of the CGHA the Minister of Finance may issue license authorising a company registered under the Companies Act 1965 (Act 125) to promote and organise gaming:

> (1) Notwithstanding this Act or the Betting Act 1953 [Act 495] or any other law relating to gaming, betting or lotteries, the Minister of Finance may, in his discretion, by licence authorize a company registered under the Companies Act 1965 [Act 125], other than a foreign company as defined in subsection 4(1) of that Act, to promote and organize gaming —
>
> (a) in respect of such game or games;
>
> (b) on such premises;
>
> (c) subject to the payment of such fees and duties; and
>
> (d) subject to such other terms and conditions.

[322] The CGHA was never included in the Schedule to POCA, neither was there any intention to include CGHA under POCA as suggested by the appellants. Thus, the argument of learned counsel for the appellants that the inclusion of gaming in the Schedule to POCA is unconstitutional is untenable for the reasons I have stated above.

[323] One of the arguments canvassed by learned counsel for the appellants in support of its contention that POCA is unconstitutional is that the recital did

not set out in full cl (1) of art 149 of the FC. By Act A1459 the following preamble was inserted in the Act:

> *Whereas action has been taken and further action is threatened by a substantial body of persons both inside and outside Malaysia to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property*;
>
> *And Whereas Parliament considers it necessary to stop such action;*

[324] It is the argument of learned counsel that the failure of Parliament to incorporate in the Recital to the Act the complete cl (1) of art 149 of the FC prescribing the intent and purpose would necessarily mean that the POCA is invalid and therefore unconstitutional. With respect, I am unable to agree with learned counsel for the appellants.

[325] The long title of an Act recites the intent and purpose of the Act. In this case the preamble of the POCA recited the purpose of the Act which is prevent any incursion or threat by a substantial body of persons within and outside Malaysia causing a substantial number of citizens to fear organised violence against persons or property. There is therefore no flaw in the Preamble as suggested by the appellants to the extent that POCA be declared unconstitutional.

THE DETENTION OF THE APPELLANTS IN THIS CASE IS MALA FIDE

[326] The final argument canvassed by the appellants is that the appellants' detention is tainted because the police officers making the arrest and recommending the detention were also subject of an inquiry by MACC into their corrupt activities. The appellants are material witnesses in that inquiry. The appellants in my view have failed to show mala fide as it was only their allegation that the police have detained to shut them up from revealing information to the MACC.

[327] On the factual matrix of these appeals I agree with the learned JC that this argument is clearly flawed and unsustainable because the appellants were detained first by the MACC before they were detained under POCA. Furthermore, based on the additional affidavit in support by Roy Azman bin Suhut the appellants are suspects in the MACC's investigations and not witnesses as claimed. Therefore, it is clear the appellants failed to discharge the burden of showing that the respondents acted mala fide in their arrest and detention.

CONCLUSION

[328] The POCA is a legislation authorised by art 149 of the FC. That being said the arguments by the appellants that s 4 of the POCA is invalid and unconstitutional are clearly untenable. In the present appeals, we are not persuaded by the arguments of learned counsels for the appellants to support their proposition that POCA and the provisions of the POCA violate art 121 of the FC.

[329] For the reasons aforesaid, s 4 of the POCA: (i) is valid and constitutional; (ii) the allegation that the detentions of the appellants is mala fide has not been made out; (iii) the appellants' argument that the Minister abused the power entrusted to him under s 22 of the POCA 1959 by including the CGHA 1953 as para 5 of the First Schedule is without merit; and (iv) online gaming is a matter that falls within the description of the crime of 'organised violence'.

[330] However, as I have stated in para [305], and as explained by my learned brother, Vernon Ong FCJ, in his grounds of judgment, under s 4 of the POCA the magistrate is bound to exercise his discretion judicially in order to ensure that all the legal procedural and constitutional safeguards are strictly complied with before issuing the remand order. There was however, no evidence before us to show that the magistrate had exercised the discretion as required. The orders issued under s 4 of the POCA by the magistrate are therefore tainted. For that reason and that reason alone, the appeals are allowed *only in terms of prayer 7* of the habeas corpus applications in respect of the remand orders issued under s 4 of the POCA.

[331] My learned brother, Vernon Ong Lam Kiat FCJ and my learned sister, Zaleha Yusof FCJ who have sight of the judgment in draft, concur with the reasons given and the conclusions reached, and have expressed their agreement to it, to form the majority judgment of this court.

Rhodzariah Bujang FCJ:

[332] I have read the judgment in draft of the learned Chief Justice of Malaysia, Tun Tengku Maimun bt Tuan Mat. I have also read the judgments in draft of my learned brother Vernon Ong FCJ and my learned sister Hasnah bt Mohammed Hashim FCJ.

[333] I respectfully concur with and adopt wholeheartedly the reasons given by the learned Chief Justice and the conclusion which Her Ladyship has arrived at. In any event, I would like to emphasise the following points.

[334] First, I concur with the learned Chief Justice that these appeals are not academic having regard to art 5(2) of the Federal Constitution and the judgment of this court in *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & Other Appeals* [2002] 4 MLJ 449; [2002] 4 CLJ 309. The respondents' preliminary objection on this point is accordingly dismissed.

[335] Second, I agree that the presumption of the constitutional validity of s 4 of the Prevention of Crime Act 1959 (Act 297) has been overcome and that the provision ought to be struck down.

[336] I further concur with the learned Chief Justice's harmonious reading of arts 4(1), 121(1) and 159(1) of the Federal Constitution and Her Ladyship's articulation of the doctrine of constitutional supremacy. In this regard, the post-amendment art 121(1) of the Federal Constitution as effected by the Constitutional (Amendment) Act 1988 (Act A704), applying the doctrine of constitutional supremacy, is not unconstitutional. The words 'federal law' in the amended art 121(1) do not have the effect of subordinating the judicial arm to the Executive or the Legislature as 'federal law' must be valid federal law having regard to art 4(1). 'Federal law' includes any constitutional amendment which may also be struck down to the extent that it contravenes the doctrine of constitutional supremacy.

[337] This court has held in *Hassan bin Marsom & Ors v Mohd Hady bin Ya'akop* [2018] 5 MLJ 141; [2018] 7 CLJ 403 that the power to order remand is a 'judicial power'. At first glance, ss 3 and 4 of Act 297 appear to provide some degree of discretion to a magistrate to refuse an application for remand if the procedural prerequisites of those sections are met.

[338] These procedural prerequisites, are embedded in the law relating to remand applications even in laws not passed under art 149(1) of the Federal Constitution, such as s 117 of the Criminal Procedure Code.

This includes for example, the production of the detenu before the magistrate within 24 hours of the arrest, informing him of the grounds of his detention as provided in art 5(3), Federal Constitution and the production of the police diary. In regular remand applications, the magistrate retains the substantive discretion to consider, after reviewing all the relevant documents produced, whether to order remand, and if ordered, to determine the length of the remand.

[339] However, in the present case, once the magistrate is satisfied that the procedural requirements leading up to the application for remand are complied with, he or she is bound to order remand for a fixed period of 21 days (first application) or 38 days (second application) irrespective of his or her own

objective assessment of whether such an application ought or ought not to be allowed, granted that the procedural requirements have been satisfied. This is borne out, as held by the learned Chief Justice, by the use of the imperative words 'shall' in the impugned portion of s 4 of Act 297.

[340] This, to my mind, and as expressed by the learned Chief Justice, is a legislative restriction of a judicial body to abide by the dictates of an executive body which this court has held to be violative of judicial power and the doctrine of separation of powers in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561; [2017] 5 CLJ 526. Section 4 of Act 297 is therefore void and should accordingly be struck down for being in contravention of art 121(1) of the Federal Constitution read together with the doctrine of constitutional supremacy espoused in art 4(1) of the Federal Constitution.

[341] Thirdly, I agree with the learned Chief Justice that the provisions of the Federal Constitution and laws which promote and protect fundamental liberties must be construed broadly while those which restrict or derogate from the same must be construed narrowly. In this regard, I am also in full agreement with the Chief Justice, that whilst gambling syndicates fall within the purview of 'organised crime' they cannot be reasonably construed as meaning 'organised violence against property or persons' which is the only recital that Parliament stipulated in the preamble of Act 297.

[342] Although, I accept that Item 5 of the Schedule to Act 297 has existed in Act 297 even prior to the enactment of the art 149(1)(a) recital into it but, its continued existence is incongruous with the narrowly construed purpose of art 149(1)(a) which seeks to prevent organised violence against property or persons. The legal and factual bases for the arrest and detention of the appellants in this case, for the common reason proffered, namely gambling syndicates, was therefore inconsistent with art 149(1)(a).

[343] As such, for the reasons stated above and fully articulated in the learned Chief Justice's judgment, I too would allow the appeals, grant each of the appellants a writ of habeas corpus and order that they be released forthwith.

Order accordingly.

Reported by Ashok Kumar